EDITOR'S NOTE

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tatus: GRANTED

ocketed:
anuary 16, 1985

Title: Johnny Green, et al., etc., Petitioners
v.
Agnes Mary Mansour, Director, Michigan Department of Social Services

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Reingold, Paul D., Burnham, William

Counsel for respondent: Caruso, Louis J.

ntry	Date	Note	Proceedings and Orders
1	Jan 16 1985	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Feb 27 1985		Brief of respondent Mansour, Dir., etc. in opposition filed.
4	Mar 7 1985		DISTRIBUTED. March 22, 1985
6	Mar 25 1985		Reply brief of petitioners Johnny Green, etc., et al. filed.
7	Mar 25 1985		Supplemental brief of petitioners Johnny Green, etc., et al. filed.
8	Mar 25 1985		REDISTRIBUTED. March 29, 1985
10	Apr 1 1985		Petition GRANTED.
			**********
12	Apr 26 1985		Order extending time to file brief of petitioner on the merits until May 30, 1985.
13	May 30 1985		Joint appendix filed.
14	Jun 6 1985		Record filed.
15	May 30 1985		Brief of petitioners Johnny Green, etc., et al. filed.
17	Jun 8 1985		Order extending time to file brief of respondent on the merits until July 19, 1985.
18	Jun 13 1985		Record filed.
19	Jun 13 1985		Certified original record, 5 volumes, received.
20	Jul 18 1985		SET FOR ARGUMENT, Monday, October 7, 1985. (4th case)
21	Jul 18 1985		Brief of respondent Mansour, Dir., etc. filed.
22	Aug 7 1985		CIRCULATED.
23	Sep 4 1985		Application for leave to file a reply brief in excess of the page limits filed (A-187), and order denying same by O'Connor, J., on September 5, 1985.
24	Sep 4 1985		
25	Sep 24 1985	X	Reply brief of petitioners Johnny Green, etc., et al. filed.
26	Oct 7 1985		ARGUED.

1 PP

EDITOR'S NOTE

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

JAN 16 1985

No. 84-6270

JOHNNY GREEN, GAIL BLESSING, THERESA E. COVEYOU, GILDA MILLS, and JUDGE MILLS, on behalf of themselves, their children, and all others similarly situated,

Petitioners,

v.

AGNES MARY MONSOUR, individually and in her official capacity as Director of the Michigan Department of Social Services,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 22, 1984.

QUESTION PRESENTED

In an action under 42 USC §1983 against a state officer for violations of federal law, does the Eleventh Amendment bar an injunctive order for notice relief to remedy past violations of federal law when no injunctive relief to restrain future violations is possible?

LIST OF PARTIES

All parties are listed in the case caption. Named plaintiff Gail Blessing was dismissed as to some claims and intervening plaintiff Johnny Greene was added in the District Court. Counsel have lost contact with named plaintiffs Michael and Linda Kelley, Amelia Van Burger, Mary Jones, and John Kiever, but they remain members of the proposed class. Defendant John T. Dempsey's successor in office as Director of the Michigan Department of Social Services is Agnes Mary Monsour.

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OPINIONS BELOW

The opinion of the Court of Appeals appears at 742 F2d 277 (6th Cir. 1984). A copy is included in the attached appendix. The opinions of the District Court for the Eastern District of Michigan were not published; copies are included in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the 6th Circuit was entered on August 22, 1984. A timely petition for rehearing en banc was denied on October 18, 1984, and this petition for certiorari was filed within 90 days of that date. Jurisdiction in the District Court was based on 28 USC 1331 and 1343(3), and this Court's jurisdiction is invoked under 28 USC §1254(i).

APPLICABLE PROVISIONS OF LAW

1. The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASES

A.

Plaintiffs, Michigan Welfare Rights Organization (MWRO) and Gail Blessing, filed a class action complaint on April 11, 1980, seeking relief primarily under 42 USC §1983, and challenging certain policies of defendant, the Director of the Michigan Department of Social Services (MDSS), relating to the provision of day care benefits for employed Aid to Families with Dependent Children (AFDC) recipients.

Plaintiffs alleged in count I of their complaint that by wrongfully refusing to deduct from plaintiffs' incomes child care costs necessitated by working parents' needs to be at their

places of employment, defendant was depriving them of benefits to which they were entitled under Title IV-A of the Social Security Act in violation of the Supremacy Clause. In count II, plaintiffs asserted that in failing to inform them properly of their rights to claim work expenses above the standard amount and of their right to request an administrative hearing to challenge defendant's denial of benefits, defendant was violating not only federal regulations but also the due process clause of the Fourteenth Amendment. Plaintiffs' third claim for relief alleged a denial of equal protection as a result of the acts alleged in count I.

Plaintiffs sought class certification, a declaratory judgment that defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged practices, notification to all class members of their rights to an administrative review under state procedures for lost benefits, and attorney's fees.

Prior to October 1, 1981, federal law required a state participating in AFDC to disregard from earned income any expenses reasonably attributable to the earning of such income. This included child care expenses incurred by working parents. Plaintiffs asserted that defendant's refusal to permit child care costs to be considered as an allowable expense of employment in calculating budgetable earned income violated Shea v. Vialpando, 416 US 251 (1974).

Effective October 1, 1981, Congress amended the relevant portion of the Social Security Act, 42 USC §602(a), to provide that the state agency shall disregard from earned income expenditures, not exceeding specified amounts, required to be incurred for care of a dependent child. See Omnibus Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357-933 (1981). Defendant implemented policies, also effective October 1, 1981, consistent with these amended provisions.

After the statutory change, plaintiffs moved for summary judgment on the merits of their claim that defendant's prior policies violated pre-October 1, 1981, federal law. Plaintiffs sought an order against defendant state official requiring the issuance of a notice similar in content to that approved by the Supreme Court in Quern v. Jordan, 440 US 332 (1979). Defendant moved to dismiss, arguing that the federal law change had rendered the pre-October 1, 1981, claims moot and that the Eleventh Amendment barred any other relief, including an order requiring issuance of a Quern-type notice to persons who had lost benefits as a result of defendant's actions.

On June 22, 1982, the District Court denied plaintiffs' motions for summary judgment and class certification and dismissed the case. The Sixth Circuit affirmed, holding that the case was not moot, but that the Eleventh Amendment barred the requested relief. See 742 F.2d 277 (6th Cir. 1984).

B.

On May 11, 1981, Carol Banas and eight other named plaintiffs filed a class action complaint, seeking relief primarily under 42 USC §1983, and challenging in count I of their complaint the constitutionality of a section of the Michigan Poor Law, which, along with policies of the defendant Director of the MDSS, required that income of stepparents be considered in determining AFDC eligibility or grant levels for stepchildren under the age of 18 who lived in the same household as the stepparent. Plaintiffs claimed the statute and policies violated the applicable provision of Title IV-A of the Social Security Act and regulations pursuant thereto.

Plaintiffs asserted in count II an equal protection violation as a result of a section of the Michigan Poor Law that allegedly required stepparents to take on a greater responsibility for support of stepchildren eligible for AFDC benefits

than was required of stepparents of stepchildren who were not eligible for AFDC benefits. In count III plaintiffs alleged that the Michigan Poor Law impermissibly burdened plaintiff's rights of family privacy and free association by encouraging stepparents to move out of the home or get a divorce if they were already married and by encouraging prospective stepparents not to marry.

Plaintiffs contended in count IV that defendant's policies permitted dependent children and their caretaker relatives, except for stepparents, to deduct from gross earned income all actual expenses of producing that income. State regulations were alleged to require eighty percent of the gross earnings of a stepparent to be automatically counted as available income without allowing for any work expense deductions. Plaintiffs asserted that this distinction between the incomes of stepparents and other caretaker relatives violated the Social Security Act and federal equal protection guarantees.

Plaintiffs sought class certification, a declaratory judgment that the state statute and defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged law and practices, notification to all class members of their rights to an administrative review under state procedures for lost benefits, and attorney's fees.

On May 28, 1981, plaintiffs filed a motion for a preliminary injunction, seeking to enjoin defendant from enforcing the challenged policies and practices regarding stepparents' incomes. The District Court granted plaintiffs' motion for a preliminary injunction, and the Sixth Circuit denied the defendant's request for a stay.

Effective October 1, 1981, and before the appeal on the merits from the District Court's preliminary injunction could be heard, Congress amended the relevant portion of the Social

Security Act, 42 USC §602(a), to provide that income of stepparents living in the same household as the child shall be counted for the purposes of determining eligibility and amount of benefits for AFDC. As a result of this change in federal law, the District Court amended the preliminary injunction by stipulation and the defendant voluntarily dismissed his appeal of the preliminary injunction.

Plaintiffs then filed a motion for summary judgment, seeking a declaration that the defendant's pre-October 1, 1981, policies violated the Social Security Act's requirements before that date and an order compelling the issuance of a notice similar in content to that approved by the Supreme Court in Quern v. Jordan, 440 US 332, 99 S.Ct 1139, 59 L.Ed 2d 358 (1979). Defendant filed a motion to dismiss the action, arguing that plaintiffs' action was mooted by the amendment to the Social Security Act and that the Eleventh Amendment was a bar to the relief sought by plaintiffs.

On June 22, 1982, the District Court issued its Memorandum Opinion and Order denying plaintiffs' motions for summary judgment and class certification and granting defendant's motion to dismiss the action. The Sixth Circuit affirmed, holding that the Eleventh Amendment barred the requested relief. See 742 F2d 277 (6th Cir. 1984).

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There is little doubt that in both cases the Plaintiffs would prevail on the merits of their claims that the Defendant's actions prior to October 1, 1981, violated then-existing federal law on child-care deductions (MWRO) and stepparent income (Banas). See Shea v. Vialpando, 416 US 251 (1974), (a state welfare plan that fails to allow working AFDC recipients to deduct all actual work expenses from earned income before that income is counted in calculating grant levels violates the Social Security Act); and King v. Smith, 392 US 909 (1968), Lewis v. Martin, 397 US 552 (1970), and 45 CFR §233.90(a)(1) (1981).

(presence of a stepparent in the home affects AFDC eligibility only if stepparents are required to support stepchildren under a state law of general applicability).

Although the substantive issues originally raised by these cases (AFDC child-care deductions in MWRO, and deeming of stepparent income in Banas) have lost some of their importance because of the changes in federal law, the underlying Eleventh Amendment question has not been resolved, and it is a critical one for this Court to address. The Sixth Circuit held that the Eleventh Amendment bars an injunctive order for notice relief to remedy past violations of federal law when no injunctive relief to restrain future violations of federal law is possible. Not only is the Sixth Circuit's holding contrary to decisions of this Court and of other Circuit Courts of Appeal, but it creates a far-reaching and unwarranted new restriction on the already limited relief available to federal court plaintiffs in suits brought under 42 USC §1983.

The Eleventh Amendment issue will arise in a host of cases, and especially welfare cases, whenever federal law changes (or defendant state officials voluntarily conform their conduct to federal law) before plaintiffs can get a permanent injunction. Just since October, 1984, when the court below issued its opinion, plaintiffs' counsel are informed that the Sixth Circuit's decision has been raised in pending district court cases in no fewer than four circuits. It is certain that the issue is one of extreme importance, that will not go away and that will often affect the rights and remedies of plaintiff classes consisting of thousands or tens of thousands of welfare recipients. The Sixth Circuit has made a sweeping constitutional change of national importance, and where, as here, the issue is squarely presented, review by this Court is both necessary and appropriate.

RESTATEMENT OF QUESTION PRESENTED

In an action under 42 USC §1983 against a state officer for violations of federal law, does the Eleventh Amendment bar an injunctive order for notice relief to remedy past violations of federal law when no injunctive relief to restrain future violations is possible?

ARGUMENT

I. Background of important Eleventh Amendment law.

In Ex Parte Young, 209 US 123 (1908), this Court established the rule that an injunctive suit against a state officer alleged to be acting contrary to federal law "is not one against the State." Pennhurst State School v. Halderman, ___ US ___, 79 L.Ed.2d 67, 79 (1984) (hereafter Pennhurst II); Young, supra, at 160. In such cases, relief is justified, "notwithstanding the obvious impact on the state itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is 'stripped of his official or representative character.'" Pennhurst II, 79 L.Ed.2d at 81, quoting Young, supra, at 160. When federal rights are violated, the doctrine of Young is deemed "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.'" Pennhurst II, 79 L.Ed.2d at 81, quoting Young, id.

Despite Young, however, this Court has held that "some forms of injunctive relief against state officials for violations of federal law" will be barred. Pennhurst II, 79 L.Ed.2d at 80. The relevant exception to Young involved

in welfare cases is the bar against "awards of retroactive monetary relief." Id. This exception is based upon the case of Ford Motor Co. v. Department of Treasury, 323 US 459, 464 (1945), in which this Court stated

> [W]hen the action is in essence one for recovery of money from the state, the state is a real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

See also Edelman v. Jordan, 415 US 651, 663 (1974).

But not all relief with monetary impact is barred. An injunction which orders state officials to perform certain acts, or to conform their conduct to federal law, is permitted since it imposes only a "prospective financial burden." Pennhurst II, 79 L.Ed.2d at 81. However, when the monetary relief sought is "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of defendant state officials," it is barred. Edelman v. Jordan, supra, at 668.

The decisions in the Jordan litigation-- Edelman v. Jordan, 415 US 651 (1974) and Quern v. Jordan, 440 US 332 (1979)-- show how the Eleventh Amendment bar operates in cases brought to enforce provisions of the Social Security Act governing federal-state welfare programs. In Jordan, as in the cases at bar, the plaintiffs sought to conform the conduct of state officials to the requirements of federal law. Jordan involved allegations that state regulations and practices violated federal law regarding the prompt processing of applications for Aid to the Aged, Blind and Disabled (AABD). In that case, the district court in 1972 entered (1) a declaratory judgment that the state law on processing applications had violated federal law from 1968 up to the date of judgment, (2) an injunction requiring future state compliance with federal law, and (3) an injunction ordering that retroactive benefits be

paid to class members who lost benefits in the past as a result of the violations of federal law. See Jordan v. Weaver, No. 71 C 70, judgment (N.D. Ill., March 15, 1972) and opinion (N.D. Ill., Feb. 4, 1972) discussed in Edelman v. Jordan, supra, at 656. See also Jordan v. Weaver, 472 F.2d 985, 996 (7th Cir. 1973).

In Edelman v. Jordan, supra, this Court held that the third portion of the district court's judgment (the retroactive award) violated the rule of Ford Motor Co. v. Department of Treasury, supra, because, although denominated as equitable relief, such an order was "indistinguishable...from an award of damages against the state." Id at 668. No other part of the district court's judgment was affected by the decision in Edelman. Cf. id at 659 n.7 and Quern v. Jordan, supra, at 347, n.18.[1]

The result after Edelman v. Jordan, then, was that for class members who filed their applications for AABD before the date of the district court's preliminary injunction, the only relief granted was a bare declaratory judgment that state law and policy violated then-existing federal law. The district court, on remand after Edelman, thus viewed its task as fashioning appropriate relief, if any, to provide redress to this group of applicants. See Jordan v. Trainor, 405 F. Supp. 802, 803-804 (N.D. Ill. 1975). At plaintiffs' request, the district court entered

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1. By the time Edelman was decided in this Court, the entire AABD program had been abolished and replaced by the federally administered Supplemental Security Income (SSI) program. See Edelman v. Jordan, 415 US at 653, n.2. Thus the second portion of the district court's judgment (the injunction requiring future compliance with the old federal law) was mooted by the change in law. Nevertheless, the AABD applicants whose rights had been violated in the past were entitled to have their past eligibility determined according to the old law if they sought an administrative remedy. See 45 CFR §205.10(b)(2)(1973) and 45 CFR §205.10(a)(18) (1973-1979). The same time-frame eligibility requirement applies to the claims of class members in the cases at bar. See 45 CFR §205.10(a)(18) (1980-1984). See also 42 USC §602(a)(22) (1982) and 45 CFR §233.20(a)(13)(ii) (1982), (states required to take all necessary steps to correct underpayments of AFDC).

an injunctive order for notice relief. That order required that the defendant state officials send notices to the relevant class members advising them of their right to file a claim for retroactive benefits under the state's administrative hearing procedure. After modifying the content of the notice, the en banc Court of Appeals affirmed the district court. Jordan v. Trainor, 563 F.2d 873 (7th Cir. 1977) (en banc), affirmed sub.nom. Quern v. Jordan, 440 US 332 (1979).

In Quern v. Jordan, 440 US 332 (1979), this Court reviewed the propriety of the notice relief ordered and determined that it did not violate the Eleventh Amendment. In Quern, state officials argued that notice relief, like the retroactive award struck down in Edelman, "will inexorably lead to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award." Id at 347. This argument was rejected by the Court, which held that "notice relief does not constitute a money judgment," id at 348 n.20, because it does not compel the state to pay any money:

> [T]he chain of causation [between the notice relief and any eventual award of benefits] is by no means unbroken; it contains numerous missing links, which can be supplied, if at all, only by the State and members of the plaintiff class and not by a federal court. The notice approved by the Court of Appeals simply apprises plaintiff class members of the existence of whatever administrative procedures may already be available under state law by which they may receive a determination of eligibility for past benefits. ...[T]he mere sending of [the] notice does not trigger the state administrative machinery. Whether a recipient of notice decides to take advantage of those state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the state, its agencies, courts, and legislature, not with the federal court.

Id at 347-348. Thus, Quern held that notice relief on behalf of a class that has lost benefits in the past in violation of

federal law is a form of injunctive relief that does not violate the Eleventh Amendment. Unlike an award of retroactive benefits, it does not itself compel the state to pay retroactive relief and thus does not cause any forbidden monetary impact on the state treasury.

II. The decision below conflicts with controlling decisions of this Court holding that notice relief is not barred by the Eleventh Amendment.

In the cases at bar, plaintiffs requested precisely the same notice relief awarded by the district court in the Jordan litigation and expressly declared to be permissible under the Eleventh Amendment by this Court in Quern v. Jordan, supra. Despite the identity of the relief requested, the Sixth Circuit below held that an order for notice relief would violate the Eleventh Amendment.

In so holding, the Sixth Circuit relied on two grounds, both of which are insupportable. First, it said that, notwithstanding Young, Edelman, and Quern, the more recent case of Cory v. White, 457 US 85 (1981), stands for the proposition that even prospective injunctive relief is barred against a state officer alleged to have violated federal law. See Banas v. Dempsey, 742 F.2d 277, 287 (6th Cir. 1984). (Appendix at 21.) But Cory is clearly inapposite. Cory was an interpleader action based upon diversity of citizenship in which no violation of federal law was ever alleged. See Cory v. White, supra, at 91. To the contrary, this Court in Cory reaffirmed the rule that the Eleventh Amendment bars even injunctive suits against state officers "unless they are alleged to be acting contrary to federal law...." Id. (emphasis supplied). Of course, if the Sixth Circuit's reading of Cory v. White were correct, Ex Parte Young would have been overruled.

Second, the Sixth Circuit set up a false distinction between the present cases and Quern v. Jordan, supra, and

then relied on it to reach an erroneous conclusion. The difference between Quern and the present cases, according to the Sixth Circuit, was that in the present cases there had been a change in federal law that eliminated any future conflict between federal and state law. See Banas v. Dempsey, supra, at 286-288. (Appendix at 19 .) According to the opinion below, without a viable claim that defendant violated federal law after that law changed, there could be no basis for an order for notice relief to redress any violation before federal law changed. Id.

The problem with this analysis is that it ignores the fact that violations of federal law (whenever they occur) may always be redressed by appropriate injunctive relief, so long as that relief is not barred by the Eleventh Amendment.[2] The point is driven home by the Jordan litigation itself. As noted above, the notice relief requested in Jordan could be sent only to those AABD eligibles whose rights were declared to have been violated in the past. However, by the time (on remand) that plaintiffs first thought to ask for notice relief, the entire AABD program had been abolished, so that no continuing violation of federal law existed. Indeed, by the time the district court granted the relief in 1975, the program had been defunct for over a year, and by the time this Court approved the notice relief in 1979, the program had not existed for five years. See Quern v. Jordan, supra, at 348, n.20. Clearly, when the Jordan plaintiffs requested notice relief for the class members who had lost benefits on account of past violations of federal law, there was no ongoing or

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2. Of course in many circumstances even monetary relief may be available against individual state officials who are sued for past violations of federal law or infringement of federal rights, regardless of whether or not the wrong is a continuing one. See e.g., Scheuer v. Rhodes, 416 US 232, 237-238 (1974) (claim for damages against defendant state officials is not barred by the Eleventh Amendment, provided the state is not the real party in interest and subject to qualified executive immunity).

"future" conflict with current federal law. Nevertheless, the notice relief was granted because it ordered state officials only to perform an act (sending notices) which would not by itself cause any impact on the state treasury.

In short, this Court has expressly ruled that notice relief is a form of injunctive relief that does not violate the Eleventh Amendment. The Sixth Circuit opinion below holds that it does, and for that reason certiorari should be granted and the Court of Appeals should be reversed.

III. The decision below conflicts with the decisions of the Fourth, Fifth, and Ninth Circuit Courts of Appeal.

Four circuits other than the Sixth Circuit have faced the issue involved in these cases-- whether notice relief to remedy past violations of federal law may be granted consistent with the Eleventh Amendment despite the absence of any current conflict between federal and state law. The Fourth, Fifth and Ninth Circuits have approved notice relief under such circumstances. See Randall v. Lukhard, 729 F.2d 966 (4th Cir. 1984) (en banc) cert. denied, ___ US ___, 53 U.S. Law Week 3237 (Oct. 1, 1984); Silva v. Vowell, 621 F.2d 640 (5th Cir. 1980) cert. denied sub. nom. Johnston v. Silva, 449 US 1125 (1981); and Beltran v. Myers, 701 F.2d 9 (9th Cir. 1983), cert. denied sub. nom. Rank v. Beltran, ___ US ___, 103 S.Ct. 3115 (1983). The Second Circuit has not allowed notice relief under those circumstances. See Colbeth v. Wilson, 707 F.2d 57 (2nd Cir. 1983), affirming 554 F.Supp. 539 (D. Vt. 1982).

In Beltran v. Myers, supra, California Medicaid applicants challenged, as violative of the Social Security Act, California's transfer-of-assets law under which they would

be rendered ineligible if they had transferred property within a certain period of time before their application. The district court and the Ninth Circuit Court of Appeals held the law to be consistent with federal law in effect at that time. See Dawson v. Myers, 622 F.2d 1304 (9th Cir. 1980). This Court granted certiorari, Beltran v. Myers, 451 US 625 (1981). While the case was pending in this Court, federal law changed in such a way that it appeared that "in the future the states will be permitted to impose transfer of assets restrictions generally similar to that of California." Id at 627. Consequently, this Court vacated and remanded the Court of Appeals' decision for reconsideration in light of the federal statutory change. Id at 628-629. Although the per curiam opinion of this Court was silent on the issue, four members of the Court, in a separate concurrence, said:

> On remand the Court of Appeals should, of course, consider the impact of the statutory change on the class members' future rights, but it also should determine what relief is appropriate to remedy the past violations. Cf. Quern v. Jordan, 440 US 332.

Id at 629.

Following the suggestion in the concurring opinion, the district court in Beltran reversed itself on the merits, held that California's transfer of assets law violated pre-change federal law, and ordered notice relief on behalf of all applicants who had lost benefits before the federal law change. Beltran v. Myers, No. 78-2350 CBM(Mx), [1982 Transfer Binder] CCH Medicare and Medicaid Guide ¶31,835 (C.D. Cal., Feb. 4, 1982). The Ninth Circuit affirmed, Beltran v. Myers, 701 F.2d 91 (9th Cir. 1983) and this Court denied certiorari. See Rank v. Beltran, ___ US ___, 103 S.Ct. 3155 (1983).

In Randall v. Lukhard, supra, Medicaid applicants in Virginia challenged a transfer-of-assets law similar to California's on grounds of its conflict with the same provisions of federal law involved in Beltran. The en banc Fourth Circuit held that Virginia's transfer-of-assets rule did not violate post-change federal law, but that it did violate pre-change federal law. Consequently, the Court of Appeals affirmed that portion of the district court's decision that granted declaratory and notice relief on behalf of applicants who applied for Medicaid before the new federal law went into effect. Certiorari was denied by this Court. ___ US ___, 53 U.S. Law Week 3237 (Oct. 1, 1984). See also Simpson v. Miller, 93 F.R.D. 450 (N.D. Ill. 1982) (district court held Illinois child care policy in violation of old federal law and ordered notice relief despite state's compliance with new federal law).

In Silva v. Vowell, supra, no change in federal law was involved as in Beltran and Randall. However, voluntary state compliance with federal law eliminated any future conflict between federal and state law. Despite state arguments that notice relief would violate the Eleventh Amendment under the circumstances of that case, the Fifth Circuit held that it should be ordered on behalf of class members who lost benefits before the state voluntarily came into compliance with federal law.

On the other side of the issue are the cases at bar and Colbeth v. Wilson, 554 F.Supp. 539 (D. Vt. 1982), aff'd per curiam sub. nom. Colbeth v. O'Rourke, 707 F.2d 57 (2nd Cir. 1983). In Colbeth, plaintiff food stamp recipients challenged a state food stamp regulation that restricted eligibility allegedly in violation of the federal Food Stamp Act. However, while the case was

pending, federal law changed to authorize the challenged state eligibility practice. In rejecting plaintiff's request for declaratory and notice relief on behalf of recipients who lost benefits before the change in federal law, the district court held that the Eleventh Amendment would "bar any form of retroactive relief," including notice relief. See 554 F.Supp. at 544.

At this point the Fourth, Fifth, and Ninth Circuits have allowed injunctive orders for notice relief (to remedy past violations of federal law) without requiring that the notice be tied to an ongoing injunction (to remedy current violations of federal law). The Second and Sixth Circuits have denied notice relief where no injunction to restrain continuing violations of federal law was possible. Given the split in the Courts of Appeal, this Court should grant certiorari, reverse the Sixth Circuit, and reaffirm the principle that when federal rights are infringed by state officials, in the present or in the past, the Eleventh Amendment bars only injunctive relief that will have a direct impact on the state treasury, and not notice relief of the kind approved in Quern v. Jordan, supra.

The issue raised by this petition has come up repeatedly in the district courts and is likely to come up again and again in the welfare area alone. Every time state officials violate federal law, and welfare recipients seek relief in federal court, part of the plaintiff class is left with no remedy absent notice relief. As happened in Quern and here in Banas, the preliminary and/or permanent injunctions that were entered offered no protection to those plaintiffs whose welfare grants had already been wrongly cut or denied. The problem is especially acute in

times of restrictive social legislation, where, as here, state administrators try to reduce their welfare rolls by changing state regulations early in anticipation of changes in federal law.

IV. If the issue presented by these cases was left open in Quern v. Jordan, as the Sixth Circuit implies, then this Court should grant certiorari to resolve the matter once and for all.

The Sixth Circuit distinguished Quern on the grounds that in Quern a permanent injunction was entered before federal law changed. See Banas v. Dempsey, 742 F.2d 277, 286-287 (6th Cir. 1984). Appendix at 19.) Why this should make a difference for Eleventh Amendment purposes is unclear, but the Sixth Circuit found a justification for its distinction in this Court's statement in Quern that the notice relief there was "properly viewed as ancillary to the prospective relief already ordered by the [district] court." Quern, supra, at 349. Thus, according to the Sixth Circuit "[t]o escape the bar of the Eleventh Amendment, an order against state officials must be both 'prospective' and ancillary to" a permanent injunction restraining ongoing violations of federal law. Banas v. Dempsey, 742 F.2d 277, 288 (emphasis by the court). Appendix at 21.)

The Sixth Circuit assumed that the "prospective relief already ordered" in the Jordan litigation referred to the permanent injunction entered before federal law changed. The Court of Appeals failed to note, however, that the permanent injunction in Jordan related only to future AABD applications and remedied only ongoing violations of federal law. The injunction did nothing to protect or to settle the rights of the class members whose rights

had been violated in the past. To the contrary, it was the declaratory judgment which held that state officials had violated federal law in the past, and therefore only the declaratory judgment applied to the class members who later sought and were granted notice relief.

Although a declaratory judgment adjudicates past misconduct, it "governs the [state] officials' future conduct," Pennhurst II, 79 L.Ed.2d at 80, and thus comes within the "prospective compliance" exception to the Edelman stricture against retroactive monetary relief. See Milliken v. Bradley, 433 US 267, 289 (1977). Unlike the award of retroactive benefits struck down in Edelman, the original Jordan declaratory judgment survived this Court's review, and that substantive federal-question determination formed the basis for the notice relief granted by the district court on remand. Since the permanent injunction in Jordan did not and could not apply to the class members seeking notice relief, the only "prospective relief already granted" to which the notice relief could have been "ancillary" was the declaratory judgment.

If in fact Quern requires, as the Sixth Circuit held, not only that notice relief be independently beyond the sweep of the Eleventh Amendment (not a retroactive monetary award), but also that it be "ancillary" to relief other than declaratory relief, this requirement is not clearly stated in the Quern opinion. While in Jordan notice relief in fact supplemented non-declaratory relief previously granted to a sub-class of plaintiffs, the Sixth Circuit has taken what happened to be true in that case and elevated it to a constitutional requirement. As pointed out supra, Argument III, three different Circuit

Courts of Appeal have failed to find any such requirement in the Quern opinion and have approved entry of notice relief when no injunction against ongoing violations of federal law was possible. If this important question was left open in Quern, as the Sixth Circuit implies, then certiorari should be granted in the case at bar to resolve the issue once and for all.[3]

CONCLUSION

For all of the above reasons, this Court should grant a writ of certiorari to review the decision of the Sixth Circuit, and the judgment of that court should be reversed.

Dated: January 15 1985

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3. Compare the Sixth Circuit's discussion of the term "ancillary", Banas v. Dempsey, 742 F.2d 277, 288 (5th Cir. 1984) with the Fifth Circuit's use of that term in Silva v. Lowell, 621 F.2d 640, 652 (5th Cir. 1980). At the very least the Circuit Courts of Appeal are at a loss to explain the meaning of the term and its effect upon Eleventh Amendment cases.

APPENDIX

Court of Appeals Opinion A-1

District Court Opinion in Ba-as A-24

District Court Opinion in MWRO A-40

Sixth Circuit Judgment A-49

Sixth Circuit Order Denying Re-Hearing A-50

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-1546

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAROL BANAS, et al.,
Plaintiffs-Appellants,

vs.

JOHN T. DEMPSEY,
Defendant-Appellee.

MICHIGAN WELFARE RIGHTS ORGANIZATION, et al.,
Plaintiffs-Appellants,

vs.

JOHN T. DEMPSEY,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed August 22, 1984 *

Before: LIVELY, Chief Judge; JONES, Circuit Judge; HOLSCHUH, District Judge.*

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* The Honorable John D. Holschuh, Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

HOLSCHUH, District Judge. In *Quern v. Jordan*, 440 U.S. 332 (1979), the Supreme Court held, in a case in which the District Court had enjoined state officials from future violations of federal law under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), that the Eleventh Amendment did not bar the additional relief of an order compelling the state officials to send notices to members of the plaintiff class of welfare recipients informing them of the availability of state administrative procedures to determine their eligibility for lost benefits. This appeal, a consolidation of two actions brought in the Eastern District of Michigan, presents questions involving the doctrine of mootness and, of more significance, the problem of under what circumstances a federal court can order a state official to give a *Quern*-type notice without violating the restrictions placed on Article III jurisdiction by the Eleventh Amendment.[1]

I.

Although both cases have given rise to the same important issues, the factual history of each case warrants separate discussion.

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[1] Plaintiffs in both cases seek remedies primarily under the civil rights statute, 42 U.S.C. § 1983, and the declaratory judgment statutes, 28 U.S.C. §§ 2201-02. Plaintiffs allege jurisdiction of the federal court under both 28 U.S.C. § 1343(3) and 28 U.S.C. § 1331. Although the parties have not questioned the jurisdiction of the federal court, we note that in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), the Supreme Court held that 28 U.S.C. § 1343 does not provide subject-matter jurisdiction to hear a case based solely on a claim that state law conflicts with the Social Security Act, because an alleged violation of the Supremacy Clause "does not, in itself, give rise to a claim 'secured by the Constitution' within the meaning of § 1343(3)," 441 U.S. at 613, and the Social Security Act is not a statute providing for "equal rights" within the meaning of § 1343(3) or "civil rights" within the meaning of 1343(4), 441 U.S. at 617-18.

In the present cases, however, the plaintiffs, in addition to the alleged violations of the Supremacy Clause, the statutory claims, also allege not "wholly insubstantial" federal constitutional (equal protection or due process) claims, which could support the court's exercise of pendent jurisdiction over the statutory claims under 28 U.S.C. § 1343. *Hagans v. Lavine*, 415 U.S. 528 (1974), apart from plaintiffs' claim of jurisdiction under 28 U.S.C. § 1331.

A.

Plaintiffs, Michigan Welfare Rights Organization (MWRO) and Gail Blessing, filed a class action complaint on April 11, 1980, seeking relief primarily under 42 U.S.C. § 1983, and challenging certain policies of defendant, the Director of the Michigan Department of Social Services (MDSS), relating to the provision of day care benefits for employed Aid to Families with Dependent Children (AFDC) recipients.

Plaintiffs alleged in count I of their complaint that by wrongfully refusing to deduct from plaintiffs' incomes child care costs necessitated by working parents' needs to be at their places of employment, defendant was depriving them of benefits to which they were entitled under Title IV-A of the Social Security Act in violation of the Supremacy Clause. In count II, plaintiffs asserted that in failing to inform them properly of their rights to claim work expenses above the standard amount and of their right to request an administrative hearing to challenge defendant's denial of benefits, defendant was violating not only federal regulations but also the due process clause of the Fourteenth Amendment. Plaintiffs' third claim for relief alleged a denial of equal protection as a result of the acts alleged in count I.

Plaintiffs sought class certification, a declaratory judgment that defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged practices, notification to all class members of their rights to an administrative review under state procedures for lost benefits, and attorney's fees.

Prior to October 1, 1981, federal law required a state participating in AFDC to disregard from earned income any expenses reasonably attributable to the earning of such income. This included child care expenses incurred by working parents. Plaintiffs asserted that defendant refused

to permit child care costs to be considered as an allowable expense of employment in calculating budgetable earned income. Defendant contended that the state could do so because it already provided day care services to recipients without cost.

Effective October 1, 1981, Congress amended the relevant portion of the Social Security Act, 42 U.S.C. § 602(a), to provide that the state agency shall disregard from earned income expenditures, not exceeding specified amounts, required to be incurred for care of a dependent child,[9] and defendant implemented policies, also effective October 1, 1981, consistent with these amended provisions. On January 29, 1982, plaintiffs moved for summary judgment on the merits of their claim that defendant's prior policies violated pre-October 1, 1981, federal law. They also sought an order against defendant state official requiring the issuance of a notice similar in content to that approved by the Supreme Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979). Defendant, on February 1, 1982, moved to dismiss the action, arguing that the federal law change had rendered the pre-October 1, 1981, claims moot and that the Eleventh Amendment barred any other relief, including an order requiring issuance of a *Quern*-type notice to persons who had lost benefits as a result of defendant's actions.

At the March 9, 1982, hearing on plaintiffs' motions for summary judgment and class certification and defendant's motion to dismiss, plaintiffs made no claim that state law violated the Social Security Act's child care expense provisions after October 1, 1981. Plaintiff's counsel admitted, on the record, that plaintiff's claims for declaratory and notice relief, if valid at all, related only to benefits allegedly lost prior to October 1, 1981.

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[9] *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357-813 (1981).

The District Court on June 22, 1982, denied plaintiffs' motions for summary judgment and class certification and granted defendant's motion to dismiss the action. It is from these rulings that plaintiffs in *MWRO* appealed.

B.

On May 11, 1981, Carol Banas and eight other named plaintiffs filed a class action complaint, seeking relief primarily under 42 U.S.C. § 1983, and challenging in count I of their complaint the constitutionality of a section of the Michigan Poor Law, which, along with policies of the defendant Director of the MDSS, required that income of stepparents be considered in determining AFDC eligibility or grant levels for stepchildren under the age of 18 who lived in the same household as the stepparent. Plaintiffs claimed the statute and policies violated the applicable provision of Title IV-A of the Social Security Act and regulations pursuant thereto.

Plaintiffs asserted in count II an equal protection violation as a result of a section of the Michigan Poor Law that allegedly required stepparents to take on a greater responsibility for support of stepchildren eligible for AFDC benefits than was required of stepparents of stepchildren who were not eligible for AFDC benefits. In count III plaintiffs alleged that the Michigan Poor Law impermissibly burdened plaintiff's rights of family privacy and free association by encouraging stepparents to move out of the home or get a divorce if they were already married and by encouraging prospective stepparents not to marry.

Plaintiffs contended in count IV that defendant's policies permitted dependent children and their caretaker relatives, except for stepparents, to deduct from gross earned income all actual expenses of producing that income. State regulations were alleged to require eighty percent of the gross earnings of a stepparent to be automatically counted as avail-

able income without allowing for any work expense deductions. Plaintiffs asserted that this distinction between the incomes of stepparents and other caretaker relatives violated the Social Security Act and federal equal protection guarantees.

Plaintiffs sought class certification, a declaratory judgment that the state statute and defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged law and practices, notification to all class members of their rights to an administrative review under state procedures for lost benefits, and attorney's fees.

On May 28, 1981, plaintiffs filed a motion for a preliminary injunction, seeking to enjoin defendant from enforcing the challenged policies and practices regarding stepparents' incomes. The District Court granted plaintiffs' motion for a preliminary injunction, which ruling was then appealed to this Court.

Effective October 1, 1981, and before the appeal from the District Court's preliminary injunction could be heard, Congress amended the relevant portion of the Social Security Act, 42 U.S.C. § 602(a), to provide that income of stepparents living in the same household as the child shall be counted for the purposes of determining eligibility and amount of benefits for AFDC.[4] As a result of this change in the law, the parties stipulated to amend the preliminary injunction order, making its prospective effect valid only up to October 1, 1981. The District Court amended the preliminary injunction order to comport with the parties' stipulation, and on October 27, 1981, defendant voluntarily dismissed his appeal of the preliminary injunction order.

Defendant, on March 19, 1982, filed a motion to dismiss the action, arguing that plaintiffs' action was mooted by the amend-

[4] See supra note 2.

ment to the Social Security Act and that the Eleventh Amendment was a bar to the issuance of any orders sought by plaintiffs. Plaintiffs, on April 9, 1982, filed their motion for summary judgment, seeking a declaration that the defendant's pre-October 1, 1981, policies violated the Social Security Act's requirements before that date and an order compelling the issuance of a notice similar in content to that approved by the Supreme Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979).

At the hearing conducted on April 13, 1982, plaintiffs admitted that the change in federal law mooted their claims for injunctive relief after October 1, 1981. Nevertheless, plaintiffs did not abandon their motions for class certification and summary judgment.

On June 22, 1982, the District Court issued its Memorandum Opinion and Order denying plaintiffs' motions for summary judgment and class certification and granting defendant's motion to dismiss the action. Plaintiffs appealed this decision jointly with the decision in the *MWRO* case.

II.

The District Court relied on both the mootness doctrine and the Eleventh Amendment in granting defendant's motions to dismiss both the *MWRO* case and the *Bonas* case. The District Court concluded that the October 1, 1981, amendments to the Social Security Act rendered plaintiffs' claims moot. Although the District Court did not develop its reasoning concerning the Article III "case or controversy" requirement, it apparently relied upon plaintiffs' admissions that they were not claiming any violation of federal law by defendant after October 1, 1981.

With respect to the request for an order directing the sending of a notice to persons who had lost benefits as a result of defendant's actions, the type of notice discussed in *Quern* v. *Jordan*, 440 U.S. 332 (1979), the District Court

concluded that the notice relief authorized by the Supreme Court in *Quern* had to be ancillary to prospective relief already granted. Finding that "plaintiffs have not obtained and could not obtain any prospective relief upon which to base an ancillary order requiring *Quern* type notice," the District Court held that the Eleventh Amendment barred any order requiring notice to the putative classes in these cases. Finally, the District Court, in light of these rulings, denied the class certification motions as moot.

III

The threshold issue presented by these consolidated appeals is whether the change in the law effective October 1, 1981, rendered plaintiffs' actions entirely moot. The mootness doctrine, one facet of the case-or-controversy requirement of Article III, has two separate components. A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest ['personal stake'] in the outcome." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980), (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

The primary relief sought by plaintiffs in both cases was an injunction to prevent the defendant Director of the Michigan Department of Social Services from enforcing state practices that allegedly were in violation of plaintiffs' rights under the Fourteenth Amendment and in violation of the Supremacy Clause of the Constitution. It is clear, and plaintiffs' counsel admitted, that the change in federal law that occurred while these actions were pending rendered plaintiffs' requests for such injunctive relief moot.[4] As noted

[4] "Of course, injunctive relief is no longer possible and, of course, plaintiffs can possibly stipulate to the modification of the preliminary injunction, indicating that no prospective injunctive relief would be necessary and that, of course, the injunction which had been entered [in *Bonas*] should have no prospective effect after October 1st." Transcript of hearing held in the District Court April 13, 1982. (Joint Appendix at 180-81)

earlier, the parties stipulated to amend the preliminary injunction in *Banas*, and it was amended by the court so that it "should have no prospective effect on and after October 1, 1981."[9] Inasmuch as plaintiffs did not contend that defendant's post-October 1, 1981, practices violated any rights of plaintiffs, or that enforcement of defendant's previous policies was "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), a controversy no longer existed regarding defendant's conduct that would have permitted the granting of a *Young* injunction to force the state official to comply with federal constitutional and statutory law.

However, even though plaintiffs' primary claim for relief – an injunction to restrain conduct in violation of federal law – had become moot, it does not necessarily follow that there was no longer a case or controversy sufficient to support federal court jurisdiction under Article III of the Constitution. If, for example, plaintiffs, in addition to their claim for prospective injunctive relief, could also have asserted a claim for damages or restitution as a result of being deprived of welfare benefits, it is clear that such a claim would have saved their actions from the bar of mootness. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978); *Powell* v. *McCormack*, 395 U.S. 486 (1969); *McKenna* v. *Peekskill Housing Authority*, 647 F.2d 332 (2d Cir. 1981). In apparent recognition that a claim of this nature in the present case would have been barred by the Eleventh Amendment, *Edelman* v. *Jordan*, 415 U.S. 651 (1974), plaintiffs made no such claim. Instead, they sought an order directing defendant to send a *Quern*-type notice to members of the putative classes and, as the predicate for such an order, a declaratory judgment that defendant's prior conduct violated federal law.

Assuming, for the purpose of resolving the threshold question of mootness, that a declaratory judgment could have been

[9] Order Amending Preliminary Injunction, Joint Appendix at 46.

the predicate for the issuance of further relief in the form of a *Quern*-type order, it seems clear that, with respect to members of the putative class in *MWRO* who lost benefits as a result of defendant's conduct, the issues of whether the District Court should have certified the class, rendered a declaratory judgment that defendant's past conduct in denying plaintiffs' benefits was violative of federal law, and ordered the service of a *Quern*-type notice advising members of the putative class of possible claims under the state's administrative procedure statutes for the recovery of those benefits remained "live." Those who lost benefits to which they allegedly were entitled also had an interest in obtaining a resolution of that issue sufficient to satisfy the "personal stake" requirement.

The *Banas* case presents a more difficult question of whether there was any longer a "case of actual controversy"[6] in view of the fact that the named plaintiffs and many members of that putative class received, as a result of the litigation, the benefits to which they claimed entitlement.[7] The *Banas* plaintiffs who received their benefits nevertheless contend that the issue of whether defendant's past conduct violated federal law was still "live" as to them, and that they and members of the putative class who received the benefits still had a "personal stake" in the outcome, because it was conceivable that defendant would still try to recoup, as overpayments, the benefits paid.[8] Defendant responds by point-

[6] An essential requirement for the ordering of a declaratory judgment, consistent with the jurisdictional requirement of Article III, is that there be "a case of actual controversy." 28 U.S.C. § 2201.

[7] Apparently, many of the persons in *Banas* who received benefits pursuant to the preliminary injunction also were provided voluntarily by defendant retroactive benefits for the period during which benefits had been lost prior to the preliminary injunction.

[8] The *Banas* plaintiffs concede that "[n]otice relief of the type contemplated for plaintiffs who lost benefits would mean little to the group who got benefits." It is argued, nonetheless, that a "different form of notice might still be appropriate," one that would simply

ing out that he not only has never sought to recoup any such benefits but has expressly waived any right to do so. Defendant further contends that, legally, he could not recoup benefits paid under an injunction, even if it were later determined that the injunction had been improvidently granted.

In our view, plaintiffs' assertion that defendant, contrary to his express representations and in light of his stipulation and dismissal of the appeal from the preliminary injunction, would attempt to recoup any benefits paid to the *Banas* plaintiffs or putative class members is purely conjectural. Accordingly, we conclude that, if all named plaintiffs and all putative class members had received benefits owed, there no longer would have remained in the *Banas* case "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). In such a case, having received the benefits to which they claimed to be entitled after filing their lawsuit, the *Banas* plaintiffs would have been under no threat of further injury as a result of defendant's conduct, *cf. Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982), and, therefore would have lacked that "personal stake in the outcome" required to assure the concrete adverseness necessary for the resolution of constitutional questions. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

The record, however, seems clear that not all members of the putative class in *Banas* did in fact receive all the benefits lost as a result of defendant's conduct allegedly in violation of federal law. It appears that during the period from the effective date of defendant's policies, March 1, 1981, to the date the preliminary injunction became effective, June

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inform them that their entitlement to the benefits received under the preliminary injunction had been adjudicated by the federal court, "so that they would know to protest any attempt at recoupment."

1, 1981, some members of the putative class lost benefits as a result of those policies. To the extent that there remained putative class members who allegedly had lost benefits and had not yet been reimbursed, the *Banas* case could not have been considered moot, even though the named plaintiffs themselves no longer had a personal stake in the receipt of any lost benefits. *See United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980).[9]

Because we conclude that the complaints in *Banas* and *MWRO* should not have been dismissed, even after the change in federal law effective October 1, 1981, on mootness grounds, we are compelled to reach the Eleventh Amendment issue. Although the existence of the required case or controversy would have enabled the District Court to exercise its jurisdiction under Article III, the exercise of the judicial power conferred by Article III is clearly restricted, in actions brought against state officials, by the Eleventh Amendment.

IV.

The Eleventh Amendment provides, as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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[9] The Federal Declaratory Judgment Act by its express language makes it clear that a court has certain discretion to grant or withhold declaratory relief. It provides, in pertinent part, that in "a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201 (emphasis added). Decisions of the Supreme Court have established the discretionary nature of this remedy. *Zemel* v. *Rusk*, 381 U.S. 1, 19 (1965); *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324 (1961); *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 241 (1952). In the present cases, the District Court dismissed the actions on jurisdictional grounds and not as a result of exercising any discretion in the withholding of declaratory relief.

Despite the limited language of the Amendment, the immunity it provides to the states was extended at an early date to suits brought by a citizen against his or her own state, *Hans* v. *Louisiana*, 134 U.S. 1 (1890), on the reasoning that the Amendment exemplified the broader doctrine of sovereign immunity of the states and that such immunity is a constitutional limitation on the federal judicial power established in Article III of the Constitution. *Pennhurst State School & Hospital* v. *Halderman*, ___ U.S. ___, ___, 104 S. Ct. 900, 906, 79 L. Ed. 2d 67, 77 (1984). The jurisdictional bar prevents federal court actions, in the absence of consent, against a state or one of its agencies or departments, *Florida Department of Health* v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); *Alabama* v. *Pugh*, 438 U.S. 781 (1978), and suits against state officials when the state is "the real substantial party in interest," *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945), regardless of the nature of the relief sought. *Cory* v. *White*, 457 U.S. 85, 91 (1982).

The present cases, brought against defendant in his official capacity as Director of the Michigan Department of Social Services, are effectively actions against the state, and would clearly be barred by the Eleventh Amendment but for the saving grace of *Ex parte Young*, 209 U.S. 123 (1908).[10] Because *Young* created an "exception" to the sovereign immunity bar to actions against the state, permitting the present

[10] The Eleventh Amendment does not bar actions for money damages arising from constitutional torts committed by state officials who are then sued in their individual capacities in federal court. Such actions, seeking to impose personal liability on the individual defendants, are not considered to be actions against the state. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). In the cases on appeal, although brought against defendant "individually and in his official capacity as Director of Michigan Department of Social Services," it is clear that the only claims asserted against him are in his official capacity as the state official charged with enforcement of state law and policies allegedly in violation of federal law, and the only relief sought is declaratory, injunctive and notice relief.

actions to be filed, it is the rationale of the *Young* doctrine that provides the basis for determining the type of relief that can now be granted in these cases. This requires a brief review of that landmark decision and the later narrowing of its reach by subsequent decisions of the Supreme Court.

A.

In *Young*, the Court held that the Eleventh Amendment does not bar an action in federal court to enjoin a state official from enforcing a state statute that allegedly violates the Fourteenth Amendment. In what the Court has since recognized as a "fiction,"[11] the *Young* Court held that an unconstitutional enactment is "void" and thereby does not "impart to the state official any immunity from responsibility to the supreme authority of the United States." *Young*, 209 U.S. at 160. Because the state could not authorize an unconstitutional action, the state official was "stripped of his official or representative character and [was] subjected to the consequences of his official conduct." *Id.*[12] If the state official were truly stripped of his official or representative character and subjected to the consequences of his official conduct, then no limitation would exist on the type of relief that could be granted. The Court, however, has never so held.

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), plaintiff filed a class action seeking declaratory and injunctive relief against state officials who were administering the federal-state programs of Aid to the Aged, Blind, or Disabled in a manner inconsistent with various federal regulations and with the Fourteenth Amendment. The District Court granted a perma-

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[11] *Pennhurst State School & Hosp.* v. *Halderman*, ____ U.S. at ____, 104 S. Ct. at 911, 79 L. Ed. 2d at 82.

[12] The "well-recognized irony" of *Young* is that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not state action under the Eleventh Amendment. *Florida Department of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) (Stevens, J., plurality opinion).

nent injunction requiring the state officials to comply with the federal law and also ordered the state officials to pay benefits that had been wrongfully withheld. The Supreme Court agreed that *Young* permitted "that part of the District Court's judgment that prospectively enjoined [the state officials] from failing to process applications within the time limits established by the federal regulations." *Id.* at 664, but the Court held that *Young* did not permit the awarding of retroactive benefits, even if characterized as equitable restitution.

Edelman made it clear that the type of relief that can be granted under the *Young* exception to the Eleventh Amendment is limited. It noted that "[t]he relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment." *Id.* at 664. *Young*, therefore, clearly permits injunctive relief to compel state officials to comply with federal law, even if the cost of that future compliance requires the expenditure of money by the state. The "ancillary effect" on the state treasury in such cases is simply the consequence of state officials being forced to comply with federal law under a *Young* injunction. *Id.* at 668. The Court set forth its position as follows:

> Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to *prospective injunctive relief*. *Ex parte Young*, *supra*, and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury*, *supra*.

Id. at 677 (emphasis added).

As the Court later pointed out in *Milliken* v. *Bradley*, 433 U.S. 267 (1977), *Edelman* "held that suit was proper to the

extent it sought 'payment of state funds . . . as a necessary consequence of *compliance in the future* with a substantive federal-question determination. . . .'" *Milliken*, 433 U.S. at 289 (emphasis added). The *Milliken* Court described this exception to the Eleventh Amendment as the "prospective-compliance exception" that "had its genesis in *Ex parte Young*." *Id.*

It is the power given federal courts under *Young* to grant injunctive relief, prospective in nature, against state officials to force compliance with federal law, that carries with it the power to issue additional orders, so long as they are ancillary to the injunction, without violating the Eleventh Amendment bar. For example, in *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978), the Court pointed out that "the . . . power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief."

This brings us to *Quern* and the "notice relief" authorized by that decision. Following the Supreme Court's remand in *Edelman*, the District Court ordered the state officials to send to each member of the plaintiff class a notice that informed the recipient, in pertinent part, that "you were denied public assistance to which you were entitled in the amount of $_____." *Jordan* v. *Trainor*, 405 F. Supp. 802, 809 (N.D. Ill. 1975). The mailing containing the notice also included a returnable "Notice of Appeal," which stated in relevant part that "[t]he department illegally delayed in the processing of my AABD application, and, as a consequence, denied me benefits to which I was and am entitled." *Id.* at 810. The Seventh Circuit Court of Appeals, sitting en banc, reversed the District Court's order on the ground that it constituted a "money judgment against the state" and, therefore, contravened the Eleventh Amendment. *Jordan* v. *Trainor*, 583 F.2d 873, 875 (7th Cir. 1977). The Court of Appeals reasoned that the language of the notice ordered by the District Court was objectionable in that it ordered, "in effect, the payment of state funds by retroactive award to

the members of the plaintiff class for past action or inaction by the State of Illinois." *Id.*

The Seventh Circuit did hold, however, that on remand the District Court could order the state officials to send a "mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits. A simple returnable notice of appeal form could also be provided." *Trainor*, 560 F.2d at 875. The Supreme Court affirmed the en banc decision of the Seventh Circuit. *Quern* v. *Jordan*, 440 U.S. 332 (1979). Before reaching the pertinent issue in *Quern*, the Court restated the principles upon which its decision was based.

> In *Edelman* we reaffirmed the rule that had evolved in our earlier cases that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. 415 U.S., at 663; see *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944). We rejected the notion that simply because the lower court's grant of retroactive benefits had been styled "equitable restitution" it was permissible under the Eleventh Amendment. But we also pointed out that under the landmark decision in *Ex parte Young*, 209 U.S. 123 (1908), a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. 415 U.S., at 667-668; see *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977); *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974). The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference be-

> tween prospective relief on one hand and retrospective relief on the other.

Quern, 440 U.S. at 337 (footnote omitted).

The *Quern* Court was of the opinion that the notice relief approved by the Seventh Circuit "falls on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman side*." 440 U.S. at 347. In rejecting petitioner's argument "that giving the proposed notice will lead inexorably to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award," the *Quern* Court pointed out that the chain of causation linking the federal court's notice relief with any monetary award "contains numerous missing links, which can be supplied, if at all, only by the state and members of the plaintiff class and not by a federal court." *Quern*, 440 U.S. at 347. The Court further characterized the notice relief as follows:

> *The notice approved by the Court of Appeals, unlike that ordered by the District Court, is more properly viewed as ancillary to the prospective relief already ordered by the court.* See *Milliken* v. *Bradley*, 433 U.S. at 290. The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue.

Quern, 440 U.S. at 349 (emphasis added).

Although the Justices sharply disagreed on the question of whether a state is a "person" for purposes of 42 U.S.C. § 1983, all were in agreement that the notice relief in *Quern* was ancillary to the prospective relief already ordered. "The Court today correctly rules that the explanatory notice approved by the Court of Appeals below is 'properly viewed as ancillary to . . . prospective relief.'" 440 U.S. at 350 (Brennan, J., concurring); "the explanatory notice approved

by the Court of Appeals clearly is ancillary to prospective relief." 440 U.S. at 388 (Marshall, J., concurring).

B.

In the present cases, plaintiffs, as a result of the change in federal law and defendant's conformance to the federal law, no longer had any ground for an injunction to prevent defendant from violating plaintiffs' rights under federal law, nor did they any longer seek such an injunction. The fundamental requirement of the *Young* doctrine, ongoing conduct by a state official allegedly in violation of federal law, that would have empowered the District Court to issue an injunction to force compliance with federal law as an exception to the jurisdictional bar of the Eleventh Amendment was simply no longer present. Thus, at the time the District Court dismissed the complaints, the foundation that supports the granting of ancillary orders against state officials without violating the Eleventh Amendment – the basic injunction to force compliance with federal law – was not present under the circumstances of these cases.

Without the foundation of a *Young* injunction to support a notice order, plaintiffs in the present cases nevertheless sought to have the District Court declare that the past conduct of the defendant state official had violated federal law for the sole purpose of ordering the state official to send *Quern*-type notices to members of the putative classes. Plaintiffs contend that the notice relief they seek could have been ordered consistent with the Eleventh Amendment because, as they argue, "[d]espite its apparently more expansive text, the Eleventh Amendment has long been held to be a bar only to money judgments and not to injunctive relief against the states. *Edelman* v. *Jordan*, 415 U.S. at 663, citing cases."[10] This reading of *Edelman*, however, has been expressly re-

[10] Appellants' brief, at 11-12.

jected by the Court in *Coey v. White*, 457 U.S. 85 (1961), in which the Court said,

> [Edelman] involved a suit against state officials claiming that their administration of a particular federal-state program was contrary to federal regulations and the Constitution. Among other things, the plaintiffs sought a judgment for benefits that had not been paid them. The case was against individual officers who allegedly were violating federal law, and it therefore arguably fell outside the reach of the Eleventh Amendment under *Ex parte Young*, 209 U.S. 123 (1908). *Edelman* held, however, that the case was in effect a suit against the State itself because a judgment payable from state funds was demanded. It was correctly noted that *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459 (1945), was authority for this result.
>
> *Edelman* did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. The Eleventh Amendment reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ." Thus, the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself. *Edelman* did not embrace, much less imply, any such proposition.

Id. at 90-91 (footnote omitted).

It is only through the fiction of *Young* that injunctions may be issued against state officials and only when it is alleged that they are acting in a manner contrary to federal law. As the fiction creates the exception to the Eleventh Amendment bar, it also limits the remedies that can be awarded. A *Quern*-type order, when it does nothing more than advise plaintiffs of the Court's issuance of a *Young* injunction and administrative remedies that might be available to plaintiffs, is deemed ancillary to the *Young* relief permitted by the Eleventh Amendment. Consistent with the fiction of *Young*, an order compelling a state official to send such notices – if it is ancillary to the *Young* injunction and prospective in its application – is still not an action against the state itself.

It is not enough that the requested orders in the present cases would have operated "prospectively" in the same sense that the notice in *Quern* was "prospective," that is, compelling future action that did not involve an invasion of the state treasury for the purpose of payment for past wrongdoing. Even orders and injunctions against state officials that are purely prospective in this sense are subject to the prohibitions of the Eleventh Amendment. *Cory v. White*, 457 U.S. 85 (1981). To escape the bar of the Eleventh Amendment, an order against state officials must be both "prospective" *and* ancillary to a *Young* injunction ordering state officials to comply with federal law – the "prospective-compliance exception." *Milliken*, 433 U.S. at 289. Because it is the fiction of *Young* that shelters such ancillary orders from not being orders against the state, when the basis of that fiction – the need for injunctive relief to force state officials to comply with federal law – disappears, so does the shelter.

Plaintiffs argue that the "ancillary" statement at the end of the *Quern* opinion was an "afterthought," and that the Court did not intend to require that notice relief be ancillary to a *Young* injunction previously ordered. While it is true

that the Court has not always been consistent in its use of this word in Eleventh Amendment jurisprudence,[14] we do not view the statement as a thoughtless comment. To the contrary, for the reasons stated, the Court's finding of ancillarity was needed to bring the order within the preambles of the *Young* doctrine.

Finally, plaintiffs contend that if *Quern* requires notice relief to be "ancillary" to other prospective relief, then the notice relief requested in the present case could be considered ancillary to the preliminary injunction entered in *Bowen* or to the declaratory judgments sought in both *Bowen* and *MWRO*. The difficulty with this suggestion is that both remedies are inadequate to support the additional orders requested by plaintiffs. The *Bowen* injunction was expressly modified so that it would have no prospective effect after the change in law became effective on October 1, 1981. After that date, there was no conduct in violation of federal law to be enjoined, and thus the injunctive relief, which may have served as the predicate for an order requiring notice relief, had been eliminated. Any declaratory judgment in these cases would concern only the past conduct of the state official, a finding, in retrospect, that certain activities of the state official had previously violated plaintiffs' rights under federal law. In our view, such a declaration would not be prospective in nature, and therefore an order based solely on a declaration regarding the past conduct of the state official would not be an order falling within the "prospective-compliance" exception necessary to bring it "on the *Ex parte Young* side of the Eleventh Amendment". *Quern*, 440 U.S. at 347.

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[14] *Young* injunctions are permissible even though there is "an ancillary effect on the state treasury." *Edelman*, 415 U.S. at 668. "Costs and attorney's fees are properly treated as 'ancillary to the federal court's power to impose injunctive relief.'" *Hutto*, 437 U.S. at 691, notice relief is "ancillary to the prospective relief already ordered by the court." *Quern*, 440 U.S. at 350.

V.

These cases illustrate, as the Supreme Court acknowledged in *Edelman*, that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." 415 U.S. at 667. The Supreme Court has also very recently observed that "the theory of *Young* has not been provided an expansive interpretation," *Pennhurst*, ___ U.S. at ___, 104 S. Ct. at 909, 79 L. Ed. 2d at 80, and the Court has emphasized the importance of recognizing that the principle of sovereign immunity of the states is a constitutional limitation on the federal judicial power established in Article III of the Constitution. *Id.* at ___, 104 S. Ct. at 906, 79 L. Ed. 2d at 77.

Under the unique circumstances of the present cases, we believe the District Judge was correct in his conclusion that at the time he ruled on the motions to dismiss, any further relief was barred by the Eleventh Amendment.

The judgment is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROL BANAS, MICHAEL K. KELLEY, LINDA I. KELLEY, AMELIA VAN BURGER, TERESA E. COVEYOU, MARY MEDLENE JONES, JOHN J. KIEVER, GILDA MILLS and JUDGE MILLS, on behalf of themselves, their children, and all others similarly situated,

Plaintiffs,

v. Civil Action No. 81-60077

JOHN T. DEMPSEY, individually and in his official capacity as Director of the Michigan Department of Social Services, HON. CHARLES W. JOINER

Defendant.

JUDGMENT

The plaintiffs' motions for summary judgment and class certification, and defendant's motion to dismiss came on for hearing before the court, Honorable Charles W. Joiner presiding, and the issues having been duly heard and a decision having been duly rendered in a Memorandum Opinion and Order dated June 22 1982.

It is Ordered and Adjudged that the plaintiffs take nothing, and that the action be dismissed on the merits, with prejudice.

ROBERT A. MOSSING

Clerk of Court

Dated: June 22, 1982
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROL BANAS, MICHAEL K. KELLEY, LINDA I. KELLEY, AMELIA VAN BURGER, TERESA E. COVEYOU, MARY MEDLENE JONES, JOHN J. KIEVER, GILDA MILLS and JUDGE MILLS, on behalf of themselves, their children, and all others similarly situated,

Plaintiffs,

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JOHN T. DEMPSEY, individually and in his official capacity as Director of the Michigan Department of Social Services, HON. CHARLES W. JOINER

Defendant.

MEMORANDUM OPINION AND ORDER

Before the court are plaintiffs' motions for summary judgment and class certification, and defendant's motion to dismiss. Since the facts of the case and its procedural development are important to an understanding of the court's ruling, they will be set out in some detail below.

I. FACTS

On May 11, 1981 the named plaintiffs filed suit "on behalf of themselves, their children and the class of all persons similarly situated." The class was defined as

being comprised of "all persons who live in households which will have their AFDC [Aid to Families with Dependent Children] benefits terminated or reduced because of the presence of a stepparent."

The complaint challenged an amendment to Section 2 of the Michigan Poor Law, MCLA 401.2, effective January 20, 1981, and Assistance Payment (AP) Manual Bulletin 81-5 and revised AP Item 208, effective March 1, 1981. Plaintiffs challenged as violative of federal statute and constitution the new policy implemented on March 1, 1981 by the Michigan Department of Social Services (MDSS) which required that incomes of stepparents be considered in determining AFDC eligibility or grant levels for stepchildren under the age of 18 who live in the same household as the stepparent. Plaintiffs contended that the state's mandate that stepparent's income be automatically considered in computing eligibility for and amount of AFDC benefits violated the applicable provision of the Social Security Act, 42 U.S.C. § 602(a)(7), and regulations parsed under the Act. 45 C.F.R. §§ 233.90(a)(1) and 233.20(a)(3)(ii)(D).

Plaintiffs' first count asserted that the federal law required defendant to aid all "dependent children"; that in determining financial eligibility and the amount of assistance for a dependent child, defendant could only consider the net income and resources actually available to support the dependent child; that defendant could not lawfully assume the availability or resources of a stepparent when determining need or eligibility unless the stepparent was legally obligated to support the stepchild "under state law

of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children"; and that Michigan does not have such a law of general applicability imposing an absolute legal obligation on stepparents to support stepchildren to the same extent as is required of natural or adoptive parents.

Plaintiffs second count asserted an equal protection violation as a result of the revisions of the Michigan Poor Law, MCLA 401.2, which allegedly required stepparents to take on a greater responsibility for support of stepchildren eligible for AFDC benefits than was required of stepparents of stepchildren who were not eligible for AFDC benefits.

Count III alleged that the state policy impermissibly burdened plaintiffs' right of family privacy and free association by encouraging stepparents to move out of the home or get a divorce if they are already married, and by encouraging prospective stepparents not to get married. Plaintiffs claimed these rights were violated because the Poor Act imposed the support duty on "the stepparent of a dependent child who lives in the same household."

Plaintiffs' fourth claim alleged another violation of federal law and equal protection. Plaintiffs contended that defendant's regular policies permited dependent children and their caretaker relatives to deduct from gross earned income all actual expenses of producing that income; plaintiffs

further asserted that the defendant permited an earned income disregard for persons qualified to receive one. Plaintiffs contended that defendant's policy applied unequally to step-parents because it did not permit the stepparent any work expense deductions or earned income disregards. Rather, 80% of the gross earnings of a stepparent was automatically counted as available income. Plaintiffs asserted that this distinction between the incomes of stepparents and other caretaker relatives violated the Act and equal protection guarantees.

Plaintiffs sought class certification; a declaratory judgment that defendant's policies and practices violated federal statutory and constitutional provisions; injunctive relief to enjoin defendant from continuing to enforce its practice; notification to all class members of their rights to an administrative review under state procedures, and; attorney's fees.

On May 28, 1981 plaintiffs filed a motion for a preliminary injunction. The motion was filed before the predecessor judge. Plaintiffs sought to enjoin, pending trial, defendant from continuing its complained of policy regarding stepparents' incomes. The motion was argued on June 16, 1981 and granted that day in a bench opinion. On June 29, 1981 a written order was issued. In pertinent part the order granting a preliminary injunction stated:

Plaintiffs have shown a strong or substantial liklihood of success on the merits inasmuch as it appears that Public Act 480 of 1980, MCLA 401.2 and the Defendant's policy as found in Assistance Payments Manual Item 208, require the assumption of income from a stepparent for the purpose of calculating Aid to Families with Dependent Children (AFDC) benefits and it appears that presuming income to be available for such purpose is violative of 42 U.S.C. § 602(a)(7) and the regulations promulgated thereunder, 45 C.F.R. 233.90(a)(1) because Public Act 480 of 1980, MCLA 401.2 is not a law of general applicability which legally obligates stepparents to support their spouse's children to the same extent that natural and adoptive parents are obligated to support their natural and adoptive children.

IT IS HEREBY ORDERED that, pending the final resolution of this case on its merits or until further order of the Court, the Defendant is preliminarily enjoined from assuming the availability of stepparent's income for the purpose of calculating AFDC benefits pursuant to Assistance Payments Manual Item 208.

IT IS FURTHER ORDERED that Defendant be and is hereby preliminarily enjoined from terminating, reducing, or denying AFDC or Medicaid benefits by reason of the assumption of the availability of stepparent's income to applicants or recipients of such benefits from and after the effective date of this order.

IT IS FINALLY ORDERED that Defendant, beginning in and for the month in which this order takes effect shall take the following actions:

(A) Reinstate all AFDC and Medicaid cases heretofore terminated because of the above enjoined policy;

(B) Raise all AFDC and Medicaid grants reduced because of the enjoined policy to their appropriate levels, and

(C) Re-evaluate the eligibility of AFDC and Medicaid applicants who were denied benefits solely by reason of the Defendant's use of Assistance Payments Manual Item 208 as modified because of the passage of 1980 PA 480.

By its own terms the order became effective June 1, 1981.

On July 1, 1981, defendant appealed the order granting a preliminary injunction to the Court of Appeals for the Sixth Circuit. Requests for stay of the order were made to both the trial and appellate courts but were denied.

On August 13, 1981 the President signed into law the Omnibus Budget Reconciliation Act of 1981, Pub.L.No. 97-35, which amended the Social Security Act, 42 U.S.C. § 602(a), effective October 1, 1981, to provide that income of stepparents living in the same household as the child shall be counted for the purposes of determining eligibility and amount of benefits for AFDC. As a result of this change in the law, the parties stipulated to amend the preliminary injunctive order, making its prospective effect valid only up to October 1, 1981. On October 21, 1981, the court entered an order amending the order granting the preliminary injunction to comport with the parties' stipulation. On October 27, 1981 the defendant's appeal was voluntarily dismissed.

The parties' motions now before the court bring to issue a concern for the narrow, discrete period of time between March 1, 1981 through June 1, 1981. March 1, 1981 was the effective date of the defendant's complained of policies. On June 1, 1981 the predecessor judge's preliminary injunction took effect, prohibiting defendant from continuing its policies. The injunction protected plaintiffs from June 1, 1981 through October 1, 1981. Both sides agree that after October 1, 1981 an amendment to the federal law upon which plaintiffs based

their lawsuit ended all potential for plaintiffs' further prospective relief.

II. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS

Plaintiffs' motion for summary judgment seeks to have this court decide the same issue that was preliminarily decided in their favor by the predecessor judge on their motion for a preliminary injunction. The legal arguments now presented by plaintiffs are substantially the same as these presented in their earlier motion. The difference is that now plaintiffs seek a declaration from this court that the past policies of defendant violated the law as it existed during March, April, and May of 1981.

The starting point for plaintiffs' motion is the then applicable section of the Social Security Act which plaintiffs assert defendant violated. Before its amendment section, 42 U.S.C. § 602(a)(7), provided:

> [T]he State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child or relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

Plaintiffs contend that the regulations promulgated under this section by the Department of Health and Human Services (HHS) and the cases that have interpreted this section require that before a state can deem the income of a stepparent

available to the stepchild there must be a state created general, unqualified obligation on stepparents to support their stepchild to the same degree as is imposed on natural or adoptive parents.

The then applicable federal regulation upon which plaintiffs rely, 45 C.F.R. § 233.90(a)(1), provided:

> The determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State, nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household.
>
> In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

(Emphasis added).

The amendment to the Michigan Poor Law, the basis for defendant's complained of change in policy, provided:

> The husband or wife of a poor person being of sufficient ability, shall relieve, maintain, and support the poor person, and the father and mother of a dependent child, and the stepparent of a dependent child who lives in the same household as the dependent child, being of sufficient ability, shall jointly or severally relieve, maintain and support the dependent child, in the manner * * * approved by the county department of social services of the county in which the poor person is settled or is living. (Emphasis added, reflecting amendment effective January 20, 1981).

MCLA 401.2. Based on this change in state law by the Michigan Legislature, defendant changed its policies effective March 1, 1981, as reflected in Assistance Payments (AP) Manual Bulletin 81-5 and AP Item 208.

Defendant's new policies created a uniform method of determining who was a "responsible and dependent relative" and of determining the amount of income from the "responsible realtive" that would be considered as available in determining the eligibility and need. The AP Manual Bulletin stated in pertinent part:

> A major simplification is in the area of the treatment of earned income. In the responsible and dependent relative processes, 80% of the responsible and dependent realtive's gross earnings are used to establish a net income amount. The 80% process incorporates all taxes and expenses and no separate calculation of these deductions is required to net income.

The relevant provision of AP Item 208 provided:

DEPARTMENT POLICY:

> A responsible relative, if financially able, is required to contribute to the support of his dependent relative who is a member of an ADC group. ADC group income may be diverted to a dependent relative of an ADC group member.
>
> A responsible relative is a person's spouse or the legal parent of an unemancipated minor child. The stepparent of an unemancipated minor child is the child's responsible relative while the stepparent and child live together.
>
> A dependent relative is a person's spouse or a person's unemancipated minor child. A person's unemancipated minor stepchild is a dependent relative when the stepparent and stepchild live together.

Plaintiffs contend that the amendment to Michigan's Poor Law did not create a legal obligation of general applicability upon stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Therefore, plaintiffs argue that defendant's change in policy violated the pre-amendment Social Security Act and the HHS regulations promulgated thereunder. Plaintiffs distinguish the stepparents' support obligation created by the Michigan Poor Law from the unrestricted and unconditional obligation of support Michigan places on natural or adoptive parents. As provided in MCLA 722.3:

> The parents are jointly and severally obligated to support a minor unless a court of competent jurisdiction modifies or terminates the obligation; or the minor is emancipated by operation of law except as otherwise ordered by a court of competent jurisdiction.

In MCLA 722.1 parents are defined as "natural parents, if married prior or subsequent to the minor's birth; adopting parents, if the minor has been legally adopted; or the mother, if the minor is illegitimate." Plaintiffs argue that this language differs greatly from the conditional stepparents' support obligation in the Poor Act. See also MCLA 722.3(2).

The plaintiffs rely upon DHS responses to other states' policies on stepparent support obligations and on case law construction of the preamended Social Security Act to support their assertion that they are entitled to the relief they seek. The court does not need to scrutinize plaintiffs' case analysis because the defendant's arguments raised in its motion to dismiss are dispositive.

Defendant's motion to dismiss argues that as a result of the amendment to the Social Security Act plaintiffs' claims are moot and the court is without jurisdiction to award any relief. Defendant contends that the change in federal law coupled with the Eleventh Amendment prohibition against awarding retrospective relief against a state requires dismissal of the case against them.

Since its passage, the Eleventh Amendment has been applied by courts to hold unconsenting states immune from the suits brought in federal courts by citizens. Evolution of the rule has led courts to bar lawsuits by private parties where the liability sought to be established would lead to a pay out from the public treasury. Edelman v. Jordan, 415 U.S. 651(1974).

In a narrow, circumscribed yet important modification of prior Eleventh Amendment analysis, the Supreme Court in Ex Parte Young, 209 U.S. 123 (1908), held that the Eleventh Amendment did not bar prospective injunctive relief. In subsequent cases, the Court sanctioned prospective relief even where such relief had an ancillary effect on the state treasury. See Graham v. Richardson, 403 U.S. 365 (1971) and Goldberg v. Kelly, 397 U.S. 254 (1970). However, in each instance the monetary impact upon the state was merely incidental to prospective relief.

In contrast to Ex Parte Young and its progeny, plaintiffs here seek to have the court award relief which is purely retrospective in nature and which is not incidental or ancillary to any prospective relief. Plaintiffs ask the court to grant them something which they are barred from recovering under the Eleventh Amendment. While plaintiffs couch their request for relief in terms of Quern type notice relief, the court finds that the request is not ancillary to any valid, awardable prosepctive relief.

The court finds that since this case involves only retrospecitve relief, it differs materially from Quern, the primary case urged upon the court by plaintiffs as support for their argument that defendant should be required to provide notice to a class regarding its past illegal conduct. In Quern the Court was called upon to answer questions left open in their remand of Edelman v. Jordan, 415 U.S. 651 (1974). The Quern

Court upheld the Court of Appeals for the Seventh Circuit's modification of the district court's order requiring notification to class members concerning Illinois' illegal untimely processing of disability claims. However, the critical distinction between the plaintiffs in Edelman/Quern and the plaintiffs here is that the Edelman/Quern plaintiffs had already been certified as a class and had already been successful in obtaining a permanent injunction, granting them full prospective relief. As a consequence, the notice approved of by the Court in Quern was viewed as ancillary to the prospective relief already granted.

In stark contrast, the present plaintiffs have not succeeded in obtaining any prospective relief at all. Plaintiffs seek to have the court make a declaratory ruling in their favor concerning past conduct, certify a class, and require defendant to send a Quern type notice to all class members. The court finds that plaintiffs have not obtained and could not obtain any prospective relief upon which to base an ancillary order requiring Quern type notice.

An examination of the well reasoned, relevant trial and appellate cases that have interpreted the impact of Ex Parte Young on the Eleventh Amendment and an application of the Supreme Court cases that have undertaken such an analysis dictate that before this court can award plaintiffs what they seek there must be an award of prospective relief in their favor.

Because the Eleventh Amendment forecloses the plaintiffs from an award of money damages as restrospective relief and because by their own admission they are not entitled to prospective relief, the court finds it is precluded from taking the steps sought by plaintiff to impose monetary retrospective relief. Quern v. Jordan, 440 U.S. 332 (1979).

Accordingly, defendant's motion to dismiss is granted and plaintiffs' motion for summary judgment is denied. The Eleventh Amendment and the mootness of this case mandate the court's ruling.

In view of the court's ruling on defendant's motion to dismiss, and plaintiffs' motion for summary judgment, the plaintiffs' motion for class certification is moot and, therefore, is denied.

CHARLES W. JOINER
UNITED STATES DISTRICT JUDGE

Dated: June 22, 1982
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN WELFARE RIGHTS ORGANIZATION, On behalf of its members, and GAIL BLESSING, individually, and both plaintiffs on behalf of all others similarly situated,

Plaintiffs,

Civil Action No. 80-60117

JOHNNY GREEN,

HON. CHARLES W. JOINER

Plaintiff-Intervenor,

v.

JOHN T. DEMPSEY, individually, and in his official capacity as Director, Michigan Department of Social Services,

Defendant.

JUDGMENT

The plaintiffs motions for summary judgment and class certification, and defendant's motion to dismiss came on for hearing before the court, Honorable Charles W. Joiner presiding, and the issues having been duly heard and a decision having been duly rendered in a Memorandum Opinion and Order dated June 22 , 1982,

It is Ordered and Adjudged that the plaintiffs take nothing, and that the action be disniss on the merits, with prejudice.

Robert A. Hossing

Clerk of the Court

Dated: June 22, 1982
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN WELFARE RIGHTS ORGANIZATION, On behalf of its members, and GAIL BLESSING, individually, and both plaintiffs on behalf of all others similarly situated,

Plaintiffs,

JOHNNY GREEN,

Plaintiff-Intervenor,

v. Civil Action No. 80-60117

JOHN T. DEMPSEY, individually and in his official capacity as Director, Michigan Department of Social Services, HON. CHARLES W. JOINER

Defendant.

MEMORANDUM OPINION AND ORDER

Before the court are plaintiffs' motions for summary judgment and class certification, and defendant's motion to dismiss.

The Act under scrutiny, commonly known as Aid to Families with Dependent Children (AFDC), is designed to assist needy families with children. The Act establishes an elaborate mechanism for state participation in the program. However, the process under inquiry herein, simply stated, requires the states first to apply federal guidelines to establish a family's need and then compare that need determination to the amount of income determined to be available to a family eligible for assistance under the program. The difference between the amount of need and the amount of available income provides the basis for establishing the amount of cash assistance to which the family will be entitled under the program. Of course, under this method of calculation the amount of income the family is deemed to earn is critical to the ultimate determination of the family's entitlement under the Act.

Both complaints sought recovery for the named plaintiffs and for those similarly situated.

I. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS

The legal issue presented to the court is quite narrow. Plaintiffs seek a finding by the court that defendant's refusal to deduct from AFDC's family incomes the costs of child care violated 42 U.S.C. § 602(a)(7). When plaintiffs filed their suit, 42 U.S.C. § 602(a)(7) provided:

> [E]xcept as may be otherwise provided in clause (8), [a state plan for aid and services to needy families with children must] provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children... as well as any expenses reasonably attributable to the earning of any such income.... (Emphasis added).

See also 45 C.F.R. §§ 233.20(a)(6)(iv) and (7)(i).

Plaintiffs argue that proper application of the statute required defendant to deduct from the incomes of AFDC

families the reasonable costs of child care. As noted at the outset, there are several other arguments raised by plaintiffs for the proposition that defendant failed to follow the law. However, the principal issue raised by plaintiffs concerns defendant's application of § 602(a)(7).

On August 13, 1981, Congress passed the Omnibus Reconciliation Act, Pub.L.No.97-35. Among other things, the Act modified the relevant provisions of the Social Security Act under scrutiny in this case. Effective October 1, 1981, 42 U.S.C. §§ 602(a)(8)(a)(ii) and (iii) were amended to provide that the state agency:

> (ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month);
>
> (iii) shall disregard from the earned income of any child, relative, or other individual specified in clause (ii), an amount equal to expenditutes for care in such month for a dependent child, or an incapacitated individual living in the same home as the dependent child, receiving aid to families with dependents children and requiring such care for such month, to the extent that such amount (for each such dependent child or incapacitated individual) does not exceed $160 (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month)....

Because of these amendments to the Act and defendant's compliance with them, plaintiffs concede that

their claim for relief, if valid at all, relates only to benefits prior to October 1, 1981.

Defendant contends that the case should be dismissed as moot. It asserts that effective October 1, 1981 it changed its policies to be consistant with the amendments to the Act. Accordingly, defendant states that the Eleventh Amendment bars plaintiffs' recovery for retroactive benefits. On the other hand, plaintiffs present arguments to support their contention that defendant violated the pre-October, 1981 law and they assert that the case is not moot as to those pre-October, 1981 claims.

The court has carefully evaluated the motions, briefs, responses, and supplemental briefs of the parties. Since the court finds plaintiffs' claims are moot and barred by the Eleventh Amendment, it need not decide whether or not defendant's pre-October, 1981 interpretation of the Act violated the law as it then existed. None of the plaintiffs claim a right to prospective relief. There is no assertion that the defendant is presently violating the law with respect to child care expenses, and there is no claim that there has been a violation after October 1, 1981.

The court finds plaintiffs' claims for pre-October, 1981 benefits are moot. The Eleventh Amendment bars plaintiffs from recovering the relief they seek. Application of the Eleventh Amendment requires the court to dismiss the lawsuit since plaintiffs seek retrospective money damages.

Five years after the Supreme Court's decision in Chisholm v. Georgia, 2 Dall. 419 (1793), in which a state was held liable to suit by a citizen of another state or a foreign country, the Eleventh Amendment was adopted and has remained unchanged. It provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The clear intent of the amendment was to reduce jurisdiction and power of federal courts over the states and to smooth the relations between the states and the federal government. Since its passage, the Eleventh Amendment has been applied by courts to hold unconsenting states immune from suits brought in federal courts by citizens. Evolution of the rule has led courts to bar lawsuits by private parties where the liability sought to be established would lead to a pay out from the public treasury. Edelman v. Jordan, 415 U.S. 651(1974).

In a narrow, circumscribed yet important modification of prior Eleventh Amendment analysis, the SupremeCourt in Ex Parte Young, 209 U.S. 123 (1908), held that the Eleventh Amendment did not bar prospective injunctive relief. In subsequent cases, the Court sanctioned prospective relief even where such relief had an ancillary effect on the state treasury. See Graham v. Richardson, 403 U.S. 365 (1971) and Goldberg v. Kelly, 397 U.S. 254 (1970). However, in each

instance the monetary impact upon the state was merely incidental to prospective relief.

In contrast to Ex Parte Young and its progeny, plaintiffs here seek to have the court award relief which is purely retrospective in nature and which is not incidental or ancillary to any prospective relief. Plaintiffs ask the court to grant them something which they are barred from recovering under the Eleventh Amendment. While plaintiffs couch their request for relief in terms of Quern type notice relief, the court finds that the request is not ancillary to any valid, awardable prospective relief.

An examination of the well reasoned, relevant trial and appellate cases that have interpreted the impact of Ex Parte Young on the Eleventh Amendment, and an application of all of the Supreme Court cases that have undertaken such an analysis, dictates that before this court can award plaintiffs what they seek there must be an award of prospective relief in their favor. Because the Eleventh Amendment forecloses the plaintiffs from an award of money damages as retrospective relief and because by their own admission they are not entitled to prospective relief, the court finds it is precluded from taking the steps sought by plaintiff to impose monetary retrospective relief. Quern v. Jordan, 440 U.S. 332(1979).

Accordingly, plaintiffs' motion for summary judgment is denied and defendant's motion to dismiss is granted.

II. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

In view of the court's ruling on plaintiffs' motion for summary judgment and defendant's motion to dismiss, plaintiffs' motion for class certification is moot and is, therefore, denied.

CHARLES W. JOINER
UNITED STATES DISTRICT JUDGE

Dated: June 22, 1982
Ann Arbor, Michigan

NO. 82-1546

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

AUG 22 1984

JOHN P. HEHMAN, Clerk

CAROL BANAS, et al.,

Plaintiffs-Appellants,

v.

JOHN T. DEMPSEY,

Defendant-Appellee.

MICHIGAN WELFARE RIGHTS ORGANIZATION, et al.,

Plaintiffs-Appellants,

v.

JOHN T. DEMPSEY,

Defendant-Appellee.

Before: LIVELY, Chief Judge; JONES, Circuit Judge; and BOLSCHUN, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party shall bear their own costs on appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

[illegible] October [illegible], [illegible]

[illegible]

John P. Hehman
Clerk

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By [illegible]
Deputy Clerk

No. 82-1566

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

OCT 18 1984

JOHN P. HEHMAN, Clerk

CAROL BANAS, ET AL.,

Plaintiffs-Appellants

vs.

JOHN T. DEMPSEY,

Defendant-Appellee.

MICHIGAN WELFARE RIGHTS ORGANIZATION, ET AL.,

Plaintiffs-Appellants

vs.

JOHN T. DEMPSEY,

Defendant-Appellee.

ORDER DENYING PETITION FOR REHEARING EN BANC

Before: LIVELY, Chief Judge; JONES, Circuit Judge; HOLSCHUH, District Judge*

A majority of the Court having not voted in favor of an en banc rehearing, the petition has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

*The Honorable John D. Holschuh, Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

84-6270

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Supreme Court, U.S.
FILED
FEB 27 1985
ALEXANDER L. STEVAS
CLERK

ORIGINAL

JOHNNY GREEN, GAIL BLESSING, THERESA E. COVEYOU, GILDA MILLS, and JUDGE MILLS on behalf of themselves, their children, and all others similarly situated,

Petitioners,

v

AGNES MARY MANSOUR, Director, Michigan Department of Social Services,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

DOES THE ELEVENTH AMENDMENT BAR ISSUANCE OF AN ORDER REQUIRING QUERN TYPE NOTICE WHERE, AS A RESULT OF A CHANGE IN FEDERAL LAW, THE PARTY SEEKING THE NOTICE RELIEF LACKED THE GROUNDS FOR, AND NO LONGER SOUGHT, INJUNCTIVE RELIEF?

JURISDICTION AND APPLICABLE PROVISIONS OF LAW

Respondent, Mansour, accepts Petitioners' statements regarding jurisdiction under 28 U.S.C. § 1254(1) and applicable provisions of law set out in their Petition for Writ of Certiorari.

COUNTERSTATEMENT OF THE CASES

Because Petitioners' Statement of the Cases is incomplete and somewhat misleading, Respondent presents this Counterstatement of the Cases in the same format as the Court of Appeals Opinion appearing at 742 F.2d 277. The Petitioners Johnny Green and Gail Blessing are two-named Plaintiffs from the suit challenging the Michigan Department of Social Services' [MDSS] policies relating to the provision of day care benefits for employed Aid to Families With Dependent Children [AFDC] recipients captioned, in the District Court, Michigan Welfare Rights Organization, et al v John T. Dempsey. [Day Care Expense Litigation]. The remaining three Petitioners, Theresa E. Coveyou, Gilda and Judge Mills are three of the original nine named Plaintiffs from the litigation challenging MDSS's treatment of stepparent income in the AFDC program captioned Carol Banas, et al v John T. Dempsey. [Stepparent Income Litigation].

A. Day Care Expense Litigation

Petitioners Green and Blessing waited until January 29, 1982, four months after the federal law change mooted out any possible prospective relief, to seek summary judgment on their claim of violation of pre-October 1, 1981, federal law. Respondent, Director of Social Services, on February 1, 1982, responded with a Motion to Dismiss on grounds of mootness and the jurisdictional bar of the Eleventh Amendment. It was not until February

9, 1982, that Petitioners sought again to certify a class in this cause, exactly thirteen months to the day from the District Court's issuance of a Memorandum Order denying class certification for lack of an adequate or typical representative.

At the March 9, 1982, hearing on Petitioners' motions for summary judgment and class certification and Respondent's motion to dismiss, Petitioners made no claim that state law violated the Social Security Act's child care expense provisions after October 1, 1981. Petitioners' counsel admitted, on the record, that the claims for declaratory and notice relief, if valid at all, related solely to benefits allegedly lost prior to October 1, 1981.

On June 22, 1982, the District Court denied Petitioners' motions for summary judgment and class certification and granted Respondent's motion to dismiss the action. Petitioners jointly appealed from that decision and the decision in the stepparent income litigation discussed in Section B, infra, to the Sixth Circuit which affirmed both in its August 22, 1984, Opinion and Judgment.

B. Stepparent Income Litigation

While Petitioners Coveyou and Mills, husband and wife, have included most of the facts from the Court of Appeals Opinion relative to the stepparent income litigation, they have omitted certain pertinent facts.

For example, the Opinion noted that the parties stipulated, as a result of the October 1, 1981, federal law change, to amend the preliminary injunction making its prospective effect valid only up to October 1, 1981. Banas v Dempsey, 742 F.2d 277, 280 (6th Cir. 1984). The amended preliminary injunction, com-

porting with the parties' stipulation, was issued by the District Court on October 21, 1981. In February, 1982, some four months later and nine months after filing suit, Petitioners' counsel finally sought a hearing on the motion for class certification which had been filed at the same time as the motion for preliminary injunction.

On March 9, 1982, Respondent filed a motion to dismiss arguing that the action was rendered moot by the amendment to the Social Security Act and that the Eleventh Amendment was a bar to the issuance of any orders sought by Petitioners.

Petitioners responded to the motion on April 9, 1982, with their motion for summary judgment, seeking a declaration that MDSS's pre-October 1, 1981, policies violated the Social Security Act's requirements before that date and an order compelling the issuance of a notice similar in content to that approved by the Supreme Court in Quern v Jordan, 440 U.S. 332 (1979).

At the hearing conducted on April 13, 1982, Petitioners' counsel admitted that the change in federal law mooted their claims for injunctive relief after October 1, 1981. They further admitted that none of the named Petitioners nor any member of the putative class, to their knowledge, had lost any benefits allegedly owed to them under the pre-October 1, 1981, law. (Transcript, April 13, 1982, pp. 34-35. Appendix pp. 1-2) Nevertheless, Petitioners did not abandon their motions for class certification and summary judgment.

On June 22, 1982, the District Court issued its Memorandum Opinion and Order denying Petitioners' motions for summary judgment and class certification and granted Respondent's motion

to dismiss the action. Petitioners appealed this decision jointly with the decision in the day care expense litigation and the Sixth Circuit affirmed. See Banas v Dempsey, supra.

Petitioners now seek a writ of certiorari to the Sixth Circuit. Respondent opposes the issuance of the writ as the Sixth Circuit's Opinion and Judgment is consistent with the decisions of this Court, particularly Quern v Jordan, supra. Further, the decisions of the Fourth, Fifth and Ninth Circuits, cited by Petitioners as supposedly being in conflict with that of the Second and Sixth Circuits, are based upon factual circumstances which do not exist in the case at bar.

ARGUMENT

I.

THE DECISION BELOW IS CONSISTENT WITH CONTROLLING DECISIONS OF THIS COURT RELATIVE TO THE ELEVENTH AMENDMENT.

In both the day care expense and stepparent income litigation the Petitioners sought and were denied declaratory judgments that the Director of Social Services had acted contrary to federal law which ceased to exist effective October 1, 1981. These judgments were sought as a predicate to the issuance of notice similar in content to that approved by this Court in Quern v Jordan, supra.

The Sixth Circuit ruled that the issuance of the requested notice is barred by the Eleventh Amendment because the notice sought in this case, unlike Quern v Jordan, supra, could not be ". . . ancillary to the prospective relief already ordered by the court." Quern, 440 U.S. at 349. In the case at bar, from the time the federal law changed on October 1, 1981, there

existed no prospective relief the District Court could afford Petitioners as had been afforded in Quern, supra, and Ex parte Young, 209 U.S. 123 (1908). Therefore, they lacked the essential prerequisite, consistent with the Eleventh Amendment, for the issuance of Quern type notice.

Petitioners suggest the Sixth Circuit inappropriately relied on Cory v White, 457 U.S. 85 (1982) in rendering the decision below. The Court of Appeals, however, was merely expanding upon this Court's holding in Pennhurst State School and Hospital v Halderman, ___ U.S. ___, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) where Justice Powell, speaking for the majority said:

> ". . . And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief. See Cory v White, 457 U.S. 85, 91, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982)." Pennhurst, ___ U.S. at ___, 104 S.Ct. at 909, 79 L.Ed.2d at 79.

This Court has used what it admits to be the "fiction" of Ex parte Young, supra, to determine what relief federal courts may provide consistent with the Eleventh Amendment. Pennhurst, supra, 104 S.Ct. at 911, 79 L.Ed.2d at 82.

In Ex parte Young, supra, this Court held that an unconstitutional enactment is "void" and thereby does not "impart to the state official any immunity from responsibility to the supreme authority of the United States." Young, 209 U.S. at 160. Therefore prospective injunctive relief was issued to require the state official, the Minnesota Attorney General, to conform his conduct to the federal constitution and this relief was not considered to violate the sovereign immunity of the state as embodied by the Eleventh Amendment.

The Quern Court characterized the notice relief approved by the Seventh Circuit as being ". . . on the Ex parte Young, supra, side of the Eleventh Amendment line rather than on the Edelman [v. Jordan, 415 U.S. 651 (1974)] side." Quern, 440 U.S. at 347. This was so because the chain of causation linking the federal court's notice relief with any monetary award "contains numerous missing links which can be supplied, if at all, only by the state and members of the plaintiff class and not by a federal court." Id. at 347. This Court went on to state:

> "The Notice approved by the Court of Appeals, unlike that ordered by the District Court is more properly viewed as ancillary to the prospective relief already ordered by the court. See Milliken v Bradley, 433 U.S. at 290. The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue." Quern, 440 U.S. at 349 (emphasis added)

In the present cases, at the time the District Court was asked to certify a class and afford relief to members of that class, there was no Young prospective injunctive relief Petitioners sought or to which they were entitled. The prospective injunctive relief, to which the Quern notice was ancillary, had been issued to a certified class in 1972. See Jordan v Weaver, No 71 C 70, judgment (N.D. Ill. March 15, 1972) and opinion (N.D. Ill. Feb. 4, 1972) discussed in Edelman v Jordan, 415 U.S. 651 (1974). The Sixth Circuit said:

> ". . . Thus, at the time the District Court dismissed the complaints, the foundation that supports the granting of ancillary orders against state officials without violating the Eleventh Amendment - the basic injunction to enforce compliance with federal law - was not present under the circumstances of these cases." Banas, 742 F.2d at 287.

The Sixth Circuit further noted that:

> ". . . to escape the bar of the Eleventh

> Amendment, an order against state officials must be both 'prospective' and ancillary to a Young injunction ordering state officials to comply with federal law - the 'prospective - compliance exception.' Milliken, 433 U.S. at 289, 97 S.Ct. 2761. Because it is the fiction of Young that shelters such ancillary orders from not being orders against the state, when the basis of that fiction - the need for injunctive relief to force state officials to comply with federal law - disappears, so does the shelter." Id. at 288.

The decision below is entirely consistent with the decisions of this Court which have uniformly emphasized the importance of recognizing that the principle of sovereign immunity of the states is a constitutional limitation on the federal judicial power established in Article III of the Constitution. Pennhurst, ___ U.S. at ___, 104 S.Ct. at 906, 79 L. Ed. 2d at 72.

Therefore as the Sixth Circuit's decision is in accord with those of this Court, the Petition for Writ of Certiorari should be denied.

II.

THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF EVERY OTHER CIRCUIT COURT OF APPEALS WHICH ADDRESSED THIS ISSUE.

In Colbeth v O'Rourke, 707 F.2d 57 (2nd Cir. 1983) the Second Circuit Court of Appeals affirmed the District Court's summary judgment for defendant, Commissioner of the Vermont Department of Social Welfare. The case involved the interpretation of certain sections of the Food Stamp Act, 7 U.S.C. §§ 2011-2029 (1976 & Supp IV 1980). As in the case at bar, a change in the relevant federal law, effectuated by a December, 1981, amendment to the Food Stamp Act, rendered Plaintiff's request for prospective injunctive relief moot before the September 2, 1982 hearing.

U.S. District Judge Coffrin in an Opinion and Order issued December 14, 1982, held, as did Judge Joiner below that the Eleventh Amendment barred the issuance of Quern type notice where such notice was not ancillary to and implementing prospective relief already ordered by the Court. Colbeth v Wilson, 554 F.Supp. 539, 546 (D.Vt. 1982).

Petitioners direct the Court's attention to the following cases from the Fourth, Fifth and Ninth Circuits contending, without basis, that the decisions of the Second Circuit in Colbeth v O'Rourke, supra, and that of the Sixth Circuit below somehow are in conflict with them. See Randall v Lukhard, 729 F.2d 966 (4th Cir. 1984) (en banc) cert. denied, ____ U.S. ___, 53 U.S. Law Week 3237 (Oct. 1, 1984); Silva v Vowell, 621 F.2d 640 (5th Cir. 1980) cert. denied, sub nom. Johnston v Silva, 449 U.S. 1125 (1981); and Beltran v Myers, 701 F.2d 91 (9th Cir. 1983) cert. denied sub. nom. Rank v Beltran, ___ U.S. ___, 103 S.Ct. 3115 (1983). Additionally Petitioners mention Simpson v Miller, 93 F.R.D. 540 (N.D. Ill. 1982) as a decision also in conflict with the case at bar.

The first case discussed by Petitioners involved a dispute over California's transfer of assets prohibition in the Medicaid program. In Beltran v. Myers, 451 U.S. 625 (1981), this Court remanded the case to the Ninth Circuit Court of Appeals for reconsideration of its decision, which had originally upheld the transfer of assets prohibition so as to afford Petitioner Beltran "...the opportunity to argue the validity of the California law under the new federal law - an issue that was not addressed by the parties in [the Supreme] Court." Beltran, 451 U.S. at 629. On remand, the District Court issued a preliminary injunction against Defendants enjoining them from "denying Medicaid eligibi-

lity to all plaintiffs who are applicants for and recipients of Medicaid on the basis of an alleged transfer of assets in any manner that is inconsistent with the transfer of assets provisions which are contained in Pub. L. 96-611, § 5, 94 Stat. 3767" Beltran v. Myers, No. 78-2350 CBM(Mx), preliminary injunction (C.D. Cal. July 30, 1981) [1981 Transfer Binder] CCH Medicare and Medicaid Guide ¶31,465 (Appendix, pp. 3-6). The later issuance of a Quern type notice was, in that case, ancillary to prospective relief to which Plaintiffs were still entitled after the change in federal law, unlike the case at bar.

The Ninth Circuit, in Beltran v Myers, 701 F.2d 91 (9th Cir. 1983) merely affirmed the District Court's jurisdiction on remand to vacate its earlier judgment and decide issues not previously decided. The appellate court affirmed the trial court's issuance of Quern type notice, as it was prospective in nature and ancillary to prospective injunctive relief which, at the time the notice was ordered, was not barred by the Eleventh Amendment. The District Court had jurisdiction in July, 1981 and thereafter to enjoin California's transfer of assets policy, which was claimed to be inconsistent with the new federal law. The notice relief was merely ancillary to such prospective injunctive relief.

A similar situation is presented in Randall v Lukhard, supra, involving a Medicaid transfer of assets prohibition which arose in the Fourth Circuit. Plaintiffs filed a class action on April 24, 1980, seeking declaratory and injunctive relief on the grounds that Virginia's transfer of assets rule violated Title XIX of the Social Security Act and the due process and equal protection clauses of the Fourteenth Amendment. Subsequently, the federal law was amended, effective July 1, 1981, to permit a

transfer of assets prohibition in certain circumstances. Virginia developed a new rule and Plaintiffs were allowed to amend their complaint to challenge the new rule as well as its predecessor.

In an Opinion and Order, issued April 16, 1982, on cross motions for summary judgment, Chief District Judge Turk held in part that: (1) the transfer of assets rule employed prior to July 1, 1981 violated the prior federal law and (2) the present policy of applying the two-year rule to applications and redeterminations filed before July 1, 1981 was also invalid. Three classes were certified, an injunction was issued barring the present policy declared invalid by the District Court, a declaratory judgment rendered and Virginia was required to give a Quern type notice to members of one of the classes who had been denied Medicaid benefits under the old transfer of assets rule. Randall v Lukhard, 536 F. Supp. 723 (W.D. Va. 1982)

On appeal, Randall v Lukhard, 709 F.2d 257 (4th Cir. 1983), a divided panel modified the notice ordered by the District Court so that it comported with Quern v Jordan, supra, stating:

> "The doctrinal dividing line between relief permissible under the Eleventh Amendment and relief barred by its reservation of sovereign immunity is, in the broadest form, that between prospective and retroactive relief. In Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908), the Supreme Court ruled that a federal court may order state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. But in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Court held that the Eleventh Amendment bars suits by private parties seeking to impose a liability for the past conduct of state officers that must be paid from public funds in a state treasury.
>
> Between these two poles and most relevant to the present case is Quern v. Jordan, 440 U.S.

> 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). There, the district court had ruled that plaintiff applicants' federal rights in a public assistance program had been, and still were being, violated. As part of an order that also included prospective injunctive relief, the lower court required state officials to send a 'mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits.' Id. at 336, 99 S.Ct. at 1142, quoting 563 F.2d at 875. . ."
>
> As such, the Court found that the giving of notice - whose costs of preparation and mailing would be de minimis, see id. at 347 n. 19, 99 S.Ct. at 1148 n. 19 - was properly viewed as ancillary to the prospective relief already granted by the lower court, rather than as a retroactive award of funds. Id. at 349, 99 S.Ct. at 1149." Randall, 709 F.2d at 268-269 (emphasis added)

The Fourth Circuit, on rehearing en banc, Randall v Lukhard, 729 F.2d 966 (1984), adopted the majority position allowing, with a modification, the notice approved by the district court because it was issued "as part of an order that also included prospective injunctive relief" and was "properly viewed as ancillary to the prospective relief already granted by the lower court". Randall, 709 F.2d at 269.

Contrary to Petitioners' representation, the Fifth Circuit, in Silva v Vowell, supra, did not address the issue on which certiorari is sought here. In that litigation, unlike the case at bar, there was no federal law change which eliminated the need for a Young injunction. On that basis alone, Silva is distinguishable, since the instant case does not involve the question whether the Eleventh Amendment bars notice relief where state officials, without any change in the federal law, voluntarily alter challenged policies.

In any event, even the notice relief issued by the District Court in Silva v Vowell, supra, was ancillary to

prospective relief already ordered by the Court. The District Court, on December 19, 1978, granted summary judgment for the plaintiffs, invalidating Texas' sixty day eligibility requirement for AFDC. That requirement remained after other eligibility requirements were voluntarily deleted from Texas AFDC Handbook. On July 3, 1979, in the District Court's final judgment, a class was certified and Quern type notice ordered. At the time of the final judgment, the District Court ordered prospective relief and ancillary notice relief. The later ruling of the Fifth Circuit in Silva v Vowell, supra, reversing the District Court's earlier grant of summary judgment (holding the sixty day eligibility requirement unconstitutional) does not change the fact that when the notice was ordered, it, like the Quern notice, was ancillary to prospective injunctive relief previously ordered by the Court.

Clearly, the foregoing decisions of the Fourth, Fifth and Ninth Circuits are wholly consistent with and indeed adopt the same analysis of Quern v Jordan as relied upon by the Sixth Circuit in its decision below. Simpson v Miller, supra, also provides no support to Petitioners. Coming, as it does, out of the same circuit as Quern, supra, the Seventh Circuit, the District Court followed the practice approved by the Seventh Circuit regarding the issuance of such notice.

The Simpson case involved Illinois' methodology for determining AFDC earned income and the State's treatment of child care expenses. In Simpson, supra, the Illinois district court, in an opinion issued February 16, 1982, certified the following class:

> "All AFDC recipients in Illinois who since April 1, 1980, have been, are, or will be employed, and who have incurred, are incurring or will incur reasonable employment-related child care expenses which defendants have failed or refused to reimburse, in their actual amount prior to October 1, 1981, and in their actual amount up to $160 per month as of

October 1, 1981." Simpson, 93 F.R.D. at 547 (emphasis added)

At the time the class was certified, the Simpson Plaintiffs were, as in each of the cases discussed above, still seeking and, as the District Court later determined in its March 17, 1982, opinion, entitled to prospective relief which had not been mooted out by the amended federal law. Plaintiffs contended and the District Court agreed, that Illinois, in addition to acting in a manner contrary to pre-October, 1981, federal law was also violating post-October, 1981, law by not reimbursing for child care even up to the limits now provided by the amended Federal law.

Each of the cases Petitioners claim to be inconsistent with the case at bar, contains an element missing from the instant case: an existing order granting prospective injunctive relief to conform the state officials conduct to current federal law: a Young injunction. There is no conflict among the Circuit Courts of Appeal that this Court needs to resolve by issuing the requested writ of certiorari.

CONCLUSION

For all of the above reasons, this Court should deny the writ of certiorari to review the decision of the Sixth Circuit and the judgment of that Court should be affirmed.

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Dated: Feb. 22, 1985
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APPENDIX

Excerpt from oral argument in Banas v Dempsey, pp. 34-35
(Sixth Circuit Joint Appendix pp A184-A185) A-1

District Court Preliminary Injunction Order
(July 30, 1981) Beltran v Myers A-3

done in five minutes then, your Honor.

THE COURT: How about ten minutes?

MR. ROSENBERG: Ten minutes, I can do it with no question.

THE COURT: All right.

MR. ROSENBERG: First, your Honor, numerosity question, we still don't know the circumstances of any of the named plaintiffs and I have asked, in my opening remarks that plaintiffs indicate those circumstances and all they can tell us is what the alleged class members, what's happened to some of them.

I would think that if they're that concerned, they would be concerned about the status of their own representative --

THE COURT: Let's find out.

What about that?

MR. DUNHAM: Well, your Honor, as to all the named plaintiffs, what occurred, they are, basically, in the category with -- using the category numbers on pages two and three of my brief, they're in the third category. In other words, they have received -- they have had no gap in their eligibility.

THE COURT: Had what?

MR. BURNHAM: No gap in eligibility because of the entry of a preliminary injunction.

In other words, what happened was they got a notice saying they would be cutoff; they requested hearings and at that point, the preliminary injunction was entered and, apparently, the defendant chose, at that point, to pay them back to June 1st. But, for some reason, did not, they did not lose actual benefits before June 1st because they were treated as a special case, or for whatever reason, we're not entirely sure.

THE COURT: May be own --

MR. BURNHAM: Carolyn Grat --

MR. ROSENBERG: Your Honor, I would suggest --

THE COURT: That's different. She applied, she was an applicant, you said?

MR. BURNHAM: No. Carolyn Grat was a recipient and was cut off.

THE COURT: Oh, I see.

MR. ROSENBERG: Your Honor, I would like the Court to draw its attention to the preliminary injunctive order and what it demanded the Department to do and what the Department has done, in relating to it and I think it's instructive to look at the

[Digest of Opinion]

New York—Liens and recoveries—Personal injury settlement—Treatment of agency lien after compromise.—The letter from the agency reducing its lien for medical assistance, which was relied upon by the court in reaching its compromise order, is binding upon the parties even though the agreement was based upon incomplete information as to the amount of assistance which had been expended on behalf of an infant recipient. Accordingly, it would be improper to set aside a compromise order which was entered into after acceptance of a letter from the agency, agreeing to compromise a $48,887 medical assistance lien for $30,000, notwithstanding the fact that the agency had expended an additional $77,125 which was not considered at the time the agency made its compromise offer.

It is undisputed that the agency has the power to reduce its lien and, in fact, it is a common practice where there is a recovery in an infant's personal injury action. This is particularly true where an infant's injuries are, as they are in this case, very serious, and it is not unusual to negotiate a reduction before a proposed compromise order is submitted to the court. The employee of the agency who made the compromise had the authority to do so because she was the party to whom the recipient's attorney had been referred, by the agency, to make the settlement. To hold otherwise would make every reduction of lien letter from the agency questionable. Even if it is true that there was an oversight by the agency as to $77,125 of its lien, this is no basis for vacating the reduction of the lien effected by the letter from the agency. The recipient has discharged his settlement obligation with the agency, as directed by the compromise order, and all of the litigants have changed their positions, barring a restoration to the status quo. *Back references*: ¶ 14,745.51, 15,620.

¶ 31,464 NEW YORK—FAIR HEARING—ADMISSIBILITY OF HEARSAY EVIDENCE

Margherita Rezoagli v. *Blum*, New York Supreme Court, Appellate Division, Second Judicial Department, Dec. 1, 1980; 79 AD 2d 607.

[Digest of Opinion]

New York—Fair hearing—Use of hearsay evidence.—Although administrative hearings are not limited to the strict rules of evidence applicable to a court of law, it is nonetheless basic that the administrative determination must be supported by some evidence, and an agency determination denying assistance must be reversed where the only evidence presented at the hearing was hearsay. Accordingly, an applicant was entitled to a grant of assistance for skilled nursing care where the reasons for the denial were a form filled out by the applicant's physician in which he erroneously marked the box recommending "related health care facility" and a caseworker's report containing a similar recommendation based on an interview with someone alleged to be a charge nurse at the skilled nursing facility.

The applicant submitted adequate documentation proving that her physician had erroneously and inadvertently checked the wrong box and that he subsequently submitted an amended form stating that the applicant needed skilled nursing care. The agency did not produce the maker of the report alleging the interview with the charge nurse, and the applicant had no opportunity to cross-examine anyone with personal knowledge of the facts contained in the report. The type of evidence presented at the hearing did not even approach minimum standards of fairness, and the determination denying assistance was arbitrary and capricious. *Back references*: ¶ 14,765, 15,620.

¶ 31,465 CALIFORNIA—TRANSFER-OF-ASSET PROHIBITION—CONFORMITY WITH FEDERAL LAW

Antonia Beltran et al v. *Beverley A. Myers*, U.S. District Court, Central District of California, No. 78-2350-CBM (Mx), July 30, 1981.

California—Conditions of eligibility—Financial eligibility—Transfer-of-asset prohibition—Conformity with federal law.—Under the federal transfer of asset law, the "Boren Long Amendment," if a state implements such a rule for Medicaid Purposes it cannot apply more restrictive provisions than are allowed in the application of the

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transfer rule to applicants for and recipients of Supplemental Security Income, except that the disqualification period may be longer under certain circumstances. Accordingly, enforcement of the Medi-Cal transfer of asset provision is preliminarily enjoined as being more restrictive and in direct conflict with existing federal law. Under Sec. 1613(b) of the Social Security Act, a presumption is created that, subject to certain exclusions, assets disposed of for less than full consideration within the preceding 24 months prior to filing an application for assistance should be included in the resources of an applicant for SSI benefits. The presumption can be overcome by "convincing evidence to establish that the transaction was exclusively for some . . . purpose" other than that of establishing eligibility.

The California transfer of asset rule conflicts with federal law in at least the following ways: (1) violates the federal requirement that only non-exempt resources which are transferred can trigger a denial of eligibility; (2) does not allow applicants to overcome the presumption that they have transferred assets in order to obtain eligibility by a showing of "subjective evidence," not even permitting applicants to show that they transferred assets to avoid probate or that they were not aware that Medi-Cal existed; (3) does not set a period of ineligibility which "bears a reasonable relationship to the uncompensated value" of the transferred resources and does not specify that, for transfers with uncompensated values of $12,000 or less, the period of ineligibility cannot be greater than two years; and (4) does not limit its application to transfers occurring within two years of application. Class action status is granted and the agency is preliminarily enjoined from enforcing an alleged transfer of asset rule in any manner inconsistent with the federal provision. *Back references*: ¶ 14,311.81, 15,560.

The decision of the U.S. Supreme Court which remanded this case is reported at 1981-1 Transfer Binder ¶ 31,050.

[Finding of Facts and Conclusions of Law]

MARSHALL, District Judge: 1. This case is before the District Court as a result of remands from the Supreme Court to the Court of Appeals on May 18, 1981, *Beltran v. Myers*, 101 S.Ct. 1961, and from the Court of Appeals to this Court on June 25, 1981. The mandate of the Court of Appeals was issued on June 30, 1981.

2. On May 10, 1979, this case was certified as a class action, with plaintiff Antonia Beltran as the representative plaintiff.

3. In its decision of May 18, 1981, the Supreme Court unanimously vacated the decision of the Court of Appeals (*Dawson v. Myers*, 622 F.2d 1304 (9th Cir. 1980)). The Court ordered that in light of a new federal statutory development, the case should be remanded for further consideration. "Petitioner [Beltran] should have the opportunity to argue the validity of the California law under the new federal law. . . ." *Beltran*, 101 S.Ct., at 1963.

4. The new federal legislation, Pub.L. 96-611, § 5, 94 Stat. 3567, was signed into law by the President on December 28, 1980.

5. Defendants have not, as of the date of the hearing in this matter (July 13, 1981) changed the California transfer of assets rule.

6. Since July 1, 1981, members of the class have been, and continue to be, denied Medi-Cal benefits as a result of the application by defendants of California's transfer of assets rule.

Conclusions of Law

1. The new federal transfer of assets law, Pub.L. 96-611, § 5 (the "Boren-Long Amendment") went into effect on July 1, 1981. *Beltran*, 101 S.Ct., at 1963.

2. The new law allows states, which so choose, to implement and apply a transfer of assets rule to applicants for and recipients of Medicaid (known in California as "Medi-Cal").

3. If a state implements such a rule, pursuant to Pub. L. 96-611, § 5(b), it cannot apply more restrictive provisions than are allowed in the application of the transfer rule to applicants for and recipients of Supplemental Security Income (SSI), pursuant to section 5(a) of Pub. L. 96-611, except for one expressly stated exception. See subsections 1902(a)(1), (2) of the Social Security Act, 42 U.S.C. § 1396a(a)(1), (2), as added by Pub. L. 96-611, § 5(b), 94 Stat. 3567.

4. California is reimbursed 50% of its Medicaid costs by the federal government under the cooperative scheme of the Medicaid statute, 42 U.S.C. § 1396b, 44 Fed. Reg. 10553 (1979).

5. Under this cooperative scheme, the state is required to comply with federal law. See *Harris v. McRae*, 100 S.Ct. 2671, 2680 (1980); *Schweiker v. Gray Panthers*, — U.S. —,

—, 49 U.S.L.W. 4792, 4793 (1981); accord *Townsend v. Swank*, 404 U.S. 282, 286 (1971).

6. California's transfer of assets rule conflicts with the federal law, as it is more restrictive in at least several ways.

7. The California rule violates the requirement of the federal law that only non-exempt resources which *are* transferred can trigger a denial of eligibility. Section 1613(e)(1) of the Social Security Act, 42 U.S.C. §1382b, as added by Pub.L. 96-611, 5(a). That section, which prohibits the denial of SSI to an individual transferring an exempt resource, is incorporated into the Medicaid statute by the requirement that no more restrictive rule be used in determining Medicaid eligibility. Pub.L. 96-611, §5(b).

8. The California rule is also more restrictive *as* it does not allow claimants to overcome the presumption that they have transferred in order to obtain eligibility by a showing of "subjective evidence", specifically including a demonstration that they transferred either to avoid probate or that they were not *aware* that Medi-Cal even existed. 22 Cal.Admin.C. §50409. By contrast, the federal law sets as the standard for overcoming the presumption a presentation of "convincing evidence". 42 U.S.C. §1382b(c)(2). The federal law does not specify that only "objective evidence" can overcome the presumption, nor does it state that particular *reasons* are explicitly insufficient.

9. The California rule is also defective as it does not set a period of ineligibility which "bear[s] a reasonable relationship to [the] uncompensated value" of the transferred resource. 42 U.S.C. §1396a(a)(2). Its open-ended procedure can result in unusually lengthy periods of ineligibility. Moreover, the California rule does not specify that for transfers with uncompensated values of $12,000 or less, the period of ineligibility cannot be greater than two years, as the federal law requires. 42 U.S.C. §1396a(a)(2).

10. The California rule is also defective because it does not limit its application to transfers occurring within two years of application. Compare 22 Cal.Admin.C. §50409(b) with 42 U.S.C. §1382b(c)(1).

11. The California rule thus directly conflicts on at least several key points with the federal law. It is *more* restrictive than the federal law, and is thus impermissible under that law.

[Injunctive Relief]

12. The standard for issuance of a preliminary injunction in this circuit requires "that the moving party demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor." *Los Angeles Memorial Coliseum Com'n v. Nat. Football*, 634 F.2d 1197, 1201 (9th Cir. 1980). Previous cases have made it clear that the test is a continuum, so that a strong showing of probable success or irreparable harm reduces the need for a strong showing at the other end of the spectrum. *Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979); *Benda v. Grand Lodge of International Ass'n. of Machinist and Aerospace Workers*, 584 F.2d 308, 314-315, (9th Cir. 1978), cert. dism'd 441 U.S. 937 (1979).

13. In this case, plaintiff fully satisfies both aspects of the test. The California rule directly conflicts with the requirements of federal law on several key points. At the very minimum, plaintiff has presented "sufficiently serious questions going to the merits to make them a fair ground for litigation." The Supreme Court implicitly held as much in remanding this case. *Beltran*, 101 S.Ct. at 1963.

14. Moreover, serious and irreparable harm threatens the class members. The denial of Medicaid coverage, and its ultimate result, the loss of needed medical assistance, including comprehensive nursing home care, represents the most basic form of irreparable harm. As a District Court concluded in preliminarily enjoining New York's transfer rule: "[T]he very survival of these individuals and these class members in similar situations is threatened by a denial of medical assistance benefits during the pendency of these actions." *Caldwell v. Blum*, CCH MEDICAID AND MEDICARE GUIDE (1979-2 Transfer Binder) ¶ 30,093 at p. 9743 (S.D.N.Y. 1979), aff'd 621 F.2d 491 (2d Cir. 1980), cert. denied 49 U.S.L.W. 3894 (June 1, 1981); see also, e.g., *Burns v. Vowell*, 424 F.Supp. 1135, 1142 (S.D. Tex. 1976); *Bracco v. Lackner*, 462 F.Supp. 436, 453 (N.D.Cal. 1978); *Stein v. Mathews*, 430 F.Supp. 1065, 1068-1070 (D.N.J. 1977), aff'd 586 F.2d 250 (3d Cir. 1978).

15. The only harm accruing to defendants if the injunction is granted will be the requirement that they provide Medi-Cal coverage to individuals who would otherwise not be covered. This additional cost is not sufficient to override the significant harm threatened for the class members. The balance of hardships tips decidedly in plaintiff's favor. *Caldwell v. Blum*, *supra*, 621 F.2d, at 498-499.

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16. Plaintiff has therefore met the standard for the issuance of preliminary injunction and a classwide injunction will therefore issue, effective immediately.

[Preliminary Injunction]

This cause having come before this Court on order to show cause why this Court should not issue a preliminary injunction, dated July 15, 1981, and the Court having considered the pleadings and papers on file herein, written and oral argument of counsel and been fully advised in the matter,

IT IS HEREBY ORDERED

That defendants, Beverlee A. Myers, *et al*., their officers, agents, servants, employees, and those persons in active concert and participation with them are enjoined from denying Medicaid eligibility to all plaintiffs who are applicants for and recipients of Medicaid on the basis of an alleged transfer of assets in any manner that is inconsistent with the transfer of assets provisions which are contained in Pub. L. No. 97-35, § 2, 94 Stat. 3567.

Specifically: (1) only non-exempt resources which are transferred can trigger a denial of eligibility, (2) claimants will be allowed to overcome the presumption that assets have been transferred in order to obtain eligibility by the presentation of "convincing evidence," including subjective evidence, (3) the period of ineligibility for transfer with uncompensated values of $12,000 or less cannot be greater than two years and (4) the transfer of assets rule will apply to transfers occurring within two years of application only.

¶ 31,466 WISCONSIN—TRANSFER OF ASSET PROHIBITION—TRANSFER OF A HOME—CONFORMITY WITH FEDERAL LAW

Ann C. Gonzagowski et al. v. Donald E. Percy, U. S. District Court, Western District of Wisconsin, No. 81-C-297, Aug. 3, 1981.

Wisconsin—Conditions of eligibility—Financial eligibility—Transfer of asset—Transfer of home.—Assets which are exempt from a Medicaid eligibility determination when owned are equally exempt when divested and an agency regulation which denied assistance to any person who transferred any asset within two years prior to the application for medical assistance was contrary to state law. Accordingly, the agency could not deny an application for assistance where the applicant transferred her home, without consideration, by contending that the transfer was presumed to have been made in contemplation of receiving assistance.

Under Secs. 1613(b) and 1902(a) of the Social Security Act, a presumption is created that, subject to certain exclusions, assets disposed of for less than full consideration within the preceding 24 months prior to filing an application for assistance should be included in the resources of an applicant for Supplemental Security Income benefits. The presumption can be overcome by "convincing evidence to establish that the transaction was exclusively for some purpose" other than that of establishing eligibility. Under the exclusions to this presumption, the law provides that "in determining the resources of an individual (and his eligible spouse) no amount thereof shall be excluded [in the home context], the fact that application therefor . . ." The language of these statutes is susceptible to only one interpretation, that is, assets which are exempt when owned are equally exempt when divested. Class action status is conditionally granted, and the agency is preliminarily enjoined from denying medical assistance, in whole or in part, to applicants by reason of their having conveyed, transferred, or disposed of their homes for less than full consideration. *Back references*, ¶ 15,658, 24,419.

[Footnotes at end of decision]

Gibson, District Judge: This is a suit to obtain enforcement of a rule promulgated by the Wisconsin Department of Health and Social Services permitting the application of investment restrictions to the transfer of assets which, if not transferred, would be excluded from consideration in determining an applicant's eligibility for Medical Assistance. The named plaintiff, Ann Gonzagowski, began the action seeking a temporary restraining order and preliminary injunction on her own behalf and on behalf of similarly situated persons. Upon the settlement of plaintiff Gonzagowski's individual claims, plaintiff moved to add Mary Elizabeth Kaiser as party plaintiff. Defendants having expressed no opposition to the motion to add a plaintiff, its motion will be granted.

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
MAR 25 1985
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-6270

JOHNNY GREEN, GAIL BLESSING, THERESA E. COVEYOU, GILDA MILLS, and JUDGE MILLS, on behalf of themselves, their children, and all others similarly situated,

Petitioners,

v.

AGNES MARY MANSOUR, Director, Michigan Department of Social Services,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appealsfor the Sixth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In section two of her brief, Respondent claims that the decision below is consistent with the decisions in Randall v. Lukhard, 729 F2d 966 (4th Cir. 1984)(en banc), Silva v. Vowell, 621 F2d 640 (5th Cir. 1980) and Beltran v. Myers, 701 F2d 91 (9th Cir. 1983).

Respondent's reading of Randall is in error. Respondent claims that the en banc 4th Circuit approved notice relief "as part of an order that also included prospective injunctive relief" against the state's application of the post-change federal law. Respondent's brief at 11, quoting Randall, 709 F2d 257, 269 (4th Cir. 1983), reversed in relevant part, 729 F2d 966, 967-969 (4th Cir. 1984)(en banc). In so arguing, Respondent relies upon the first panel's decision in the litigation. The en banc decision's conclusions on notice relief could not possibly have been based upon any injunctive relief addressed to post-change federal and state law since the en banc decision concluded that there was no conflict between post-change federal law and post-change Virginia law. See Randall, 729 F2d at 967-969.

As to Silva v. Vowell, supra, the fact that the lack of conflict between current federal law and current state law was caused by a change in federal law in the cases as bar is no basis for distinquishing the instant cases from Silva. The 6th Circuit's theory in Quern--that an injunction based on current federal law restraining the operation of current state law must exist since notice relief must be "ancillary" to that injunction--would apply whether that injunction is unavailable because of a change in federal law, because of a change in state law, or because of a combination of the two.* If Respondent means to argue that the change in federal law in the current cases retroactively invalidated any claims arising under prior federal law, she is incorrect. See Petition, p. 9, footnote 1.

* Contrary to what Respondent implies, in MWRO v. Dempsey below, the child care deduction case, there was both a change in federal law and a change in state law. Federal law has always required that child care expenses be deducted; OBRA simply placed a dollar limit on the deduction. The conflict between state and federal law, then, was only eliminated when Respondent's predecessor changed the state regulation to allow the deduction.

Respondents other attempts to show harmony between the decision of the 6th Circuit below and Silva v. Vowell must also fail. Similarly to her argument regarding Randall, discussed above, Respondent attempts to justify the notice relief approved in Silva as "ancillary" to the district court's "December 19, 1978 . . . summary judgment for the plaintiffs, invalidating Texas' 60-day eligibility requirement for AFDC." Respondent's brief at 12. The 5th Circuit in Silva could not possibly have had such an ancillary connection in mind since the very same decision upholding notice relief vacated that portion of the summary judgment upon which Respondent relies. 621 F2d at 649-650. The only portion of the district court's summary judgment to which notice relief could have been "ancillary" under Respondent's theory, was the portion related to the "light work" regulation. 621 F2d at 651. However, it was this regulation that had been changed to comply with federal law before entry of the summary judgment. 621 F2d at 647 and 654. Consequently, in Silva the 5th Circuit (1) approved the portion of the district court's summary judgment relating to the light work requirement despite the fact that the light work regulation had been changed to comply with federal law before that judgment was entered, and (2) held that notice relief to the class affected by the light work requirement would not be barred by the 11th amendment. 621 F2d at 651-654. This is precisely the same relief and the same circumstances for awarding it that faced the 6th Circuit below.

Respondent also argues that Beltran v. Myers, supra, is in harmony with the decision below because of the existence of a preliminary injunction in favor of a portion of the class. See Respondent's brief at pp. 8-9. There is, of course, no evidence that either the district court or the 9th Circuit Court of Appeals relied upon the existence of the preliminary injunction based upon post-change federal law to support the order for notice relief to remedy violations of the pre-change federal law. In any event, a preliminary injunction was entered in one of the two consolidated

cases considered by the 6th Circuit below. See Banas v. Dempsey, 742 F2d 277, 288 (6th Cir. 1984), appendix at p. A-22. Nonetheless, the 6th Circuit in Banas expressly rejected any contention that the notice relief ordered could be "ancillary" to the preliminary injunction. Id. Though there is a distinction between the preliminary injunction in Banas and the one in Beltran in that the former was "modified so that it would have no prospective effect after the change in law", 742 F2d at 288, appendix at A-22, this distinction should not matter if the 6th Circuit's reading of Quern is accepted. After all, by the time notice relief was ordered in Quern v. Jordan, the injunction to which the 6th Circuit would read notice relief as "ancillary" similarly had had no "prospective effect" for at least a year prior to the entry of the order for notice relief. See Petition p. 12 at Quern v. Jordan, 440 US 332, 348 note 20 (1979).

For all the above reasons, it is clear that there is a conflict on the issues at bar between the 6th Circuit decision below and the cited decisions of the Fourth, Fifth, and Ninth Circuits.

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Dated: March 22, 1985

EDITOR'S NOTE

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No. 84-6270 (8)

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Rule 22.6, Petitioners submit this brief supplementing their Petition for Writ of Certiorari.

In Section III of their petition, petitioners demonstrate how the decision below, Banas v. Dempsey, 742 F2d 277 (6th Cir. 1984), conflicts with the decisions of the Courts of Appeal for the Fourth, Fifth, and Ninth Circuits. See pp. 13-17 of Petition. Since the filing of the petition, the Court of Appeals for the Eleventh Circuit has decided Appleyard v. Wallace, No. 84-7050 (March 8, 1985) (copy attached). That decision is inconsistent with Banas and consistent with the Fourth, Fifth and Ninth Circuit cases discussed in the Petition.

In Appleyard, plaintiffs, suing under 42 USC §1983, challenged an Alabama Medicaid level of care regulation which had barred their admission to nursing homes and appropriate Medicaid eligibility, as violative of the Federal Social Security Act and the United States Constitution. While the case was pending, Alabama revised its regulation making it consistent with federal law. Plaintiffs therefore sought no relief with regard to the new regulation, but continued to press their claims for notice relief on behalf of the class that had lost benefits under the old regulation during the period that it was in force. (April 1982 to September 1983).

The Eleventh Circuit reversed the district court's dismissal of plaintiffs' complaint, holding that claims for notice relief for a past period of Medicaid eligibility were neither moot nor barred by the Eleventh Amendment, on authority of Quern v. Jordan, 440 US 332 (1979). The Appleyard court specifically rejected the argument that "some actual injunctive, declarative, or other prospective relief, aside from notice relief itself, together with a concommitant determination that the defendants acted illegally, must precede an award of notice relief." See infra App - 8. Instead, consistent with the Petitioners' views herein and contrary to those of the Sixth Circuit in Banas, the Eleventh Circuit concluded:

> We cannot see any basis upon which to distinguish Quern notice from other forms of equitable relief permissible under the eleventh amendment. That a claim for injunctive relief becomes moot should not, therefore, moot a separate claim for Quern notice. . . . [N]otice relief is not barred by the eleventh amendment since the cost of that notice is more properly characterized as ancillary.

App. a 9-10.

For all the above reasons, the Court should grant the Petition for Certiorari and reverse the Sixth Circuit decision in Banas.

Respectfully submitted,

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Dated: March 22, 1985

Aimo A. APPLEYARD et al., Plaintiffs,

Pearl Snyder, as personal representative of Elizabeth J. Beasley, deceased, Virginia Booth, Jackie Causey, and Ronald Pierce, as personal representative of Elizabeth Crimes, deceased, Plaintiffs-Appellants,

v.

George C. WALLACE, Governor of the State of Alabama, as "Single State Agency," for Administration of the Alabama Medicaid Program, et al., Defendants-Appellees.

No. 84-7888.

United States Court of Appeals, Eleventh Circuit.

March 8, 1985

Plaintiffs who were denied medicaid nursing home benefits brought action challenging Alabama's medicaid level of care admission criteria. The United States District Court for the Middle District of Alabama, Robert E. Varner, J., denied motion for class certification and dismissed action as moot. On appeal, the Court of Appeals, Thornberry, Senior Circuit Judge, sitting by designation, held that: (1) typicality requirement was met, and therefore class should have been certified, and (2) state's revision of its criteria did not render the action moot, as plaintiffs had a live claim for an order requiring defendants to send notice to members of putative class advising them that they were denied benefits under invalid criteria and that a state administrative procedure was available to determine whether they were entitled to past benefits.

Vacated and remanded.

1. Federal Civil Procedure ⇐=184

Typicality requirement for class action under rule primarily directs district court to focus on whether named representatives' claims have same essential characteristics as claims of class at large. Fed. Rules Civ.Proc.Rule 23(a), (a)(3-4), 28 U.S.C.A.

2. Federal Civil Procedure ⇐=184

Typicality requirement for class action under rule may be satisfied even if there are factual distinctions between claims of named plaintiffs and those of other class members. Fed.Rules Civ.Proc.Rule 23(a), (a)(3-4), 28 U.S.C.A.

3. Federal Civil Procedure ⇐=189

Factual differences surrounding medical condition of each of the named plaintiffs, individuals who had been denied medicaid nursing home benefits under Alabama's medicaid level of care admission criteria, did not compel denial of class action certification under class action rule's typicality requirement, as factual distinctions had little or no relevancy to relief requested by plaintiffs, and similarity of legal theories shared by plaintiffs in class at large was so strong as to override whatever factual differences might have existed and dictated determination that named plaintiffs' claims were typical of those of members of putative class. Fed.Rules Civ. Proc.Rule 23(a), (a)(3-4), 28 U.S.C.A.

4. Federal Civil Procedure ⇐=189

Alabama's revision of its medicaid level of care admission criteria did not render moot action by plaintiffs challenging denial to them of medicaid nursing home benefits

under the prior criteria, as plaintiffs had a live claim for an order requiring defendants to send a notice to members of putative class advising them that they were denied benefits under invalid criteria and that a state administrative procedure was available to determine whether they were entitled to past benefits.

Appeal from the United States District Court for the Middle District of Alabama.

Before GODBOLD, Chief Judge, ANDERSON, Circuit Judge, and THORNBERRY *, Senior Circuit Judge.

THORNBERRY, Senior Circuit Judge:

The plaintiffs brought suit against the Governor of Alabama and the Commissioner of the Alabama Medicaid Agency, alleging that Alabama's Medicaid level of care admission criteria violated the Federal Social Security Act, the Civil Rights Act, and the equal protection and due process clauses of the constitution. While the action was pending in district court Alabama revised the challenged criteria. The district court subsequently denied the plaintiffs' motion for class certification and dismissed the action as moot and barred by the eleventh amendment. The plaintiffs appeal. We vacate the district court's order denying the plaintiffs' motion for class certification and dismissing the action and remand for further proceedings consistent with this opinion.

FACTS

The five named plaintiffs in this action [1] each had been denied Medicaid nursing home benefits on the grounds that they did not meet the level of care criteria embodied in Rule 560-X-10.13, Alabama Medicaid Agency Administrative Code. Under that rule applicants for nursing home benefits were required to show that they needed medical care and associated services that could be provided only in a nursing home. The rule listed a number of criteria, each describing a particular type of such medical care or service (e.g. "tube feeding per gastrostomy"). To qualify for benefits the applicant was required to meet a specified number of the listed criteria.

The plaintiffs brought this action challenging the level of care criteria on June 24, 1982. In their complaint they alleged that the criteria violated the Social Security Act, the Civil Rights Act, and the constitution. They sought declaratory and injunctive relief and purported to represent a class consisting of "all persons in the State of Alabama who have applied for Medicaid care and treatment in nursing homes who are financially eligible for such Medicaid who have been denied Medicaid under the Alabama level of care admission criteria." The record indicates that there are approximately 1,200 members of the putative class.

While the case was pending in the district court, Alabama revised the challenged level of care criteria and began to provide Medicaid nursing home benefits to all the named plaintiffs. The challenged version of the rule was in effect from April 1982

* Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

1. Plaintiff Appleyard does not join this appeal. Plaintiffs Beasley and Grimes have died during the pendency of the appeal, but are present in the action through their personal representatives.

through September 1983. The plaintiffs do not challenge the validity of the new rule. On September 28, 1983, the district court held a hearing to consider the plaintiffs' motion for class certification and the defendants' motion to dismiss. Subsequently, the district court issued its Order and Opinion, denying the plaintiffs' motion for class certification and dismissing the action.

In denying class certification the district court stated:

> A review of the Medicaid admissions procedure, a process which includes opportunities for applicants to present information concerning their individual applications at both a fair hearing and a reconsideration, indicates that Medicaid eligibility decisions are based on a consideration of widely varrying medical backgrounds. The vast factual differences surrounding the medical condition of each of the named Plaintiffs prevent these Plaintiffs from having claims or defenses which would be typical of all members of the putative class.

The court also asserted that the claims of the named plaintiffs "could hardly be typical of those of the members of the purported class" since the plaintiffs were then receiving nursing home benefits.

In dismissing the action the district court held that

> [I]n light of the fact that all of the named Plaintiffs are currently receiving the Medicaid benefits which they sought, this Court is of the opinion that the case at bar is now moot and must be dismissed under Article III of the United States Constitution, which confers jurisdiction only over cases and controversies.

The court also noted that any claim for retroactive benefits would be barred by the eleventh amendment under *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

On appeal the plaintiffs contend (1) that the district court abused its discretion in refusing to certify the class and (2) that the case is not moot or barred under the eleventh amendment since the plaintiffs have a live claim for notice relief under *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979).[2]

I. Class Certification

The district court refused to certify the class action, stating that "[t]he vast factual

2. The plaintiffs do not pursue a challenge to the district court's holding that their claim for declaratory relief was moot. In their complaint the plaintiffs sought a declaration that the level of care criteria were invalid. Although we do not decide the issue, we note that there is at least some authority for the proposition that a claim for a declaratory judgment that a rule is invalid is not necessarily mooted when the rule is revised or the plaintiffs made eligible in the future for benefits that they were denied under the former rule. In some circumstances, "amendment of a challenged legislative rule does not moot an attack on the former provisions. The most obvious reasons for denying mootness are that the former provisions continue to control the consequences of past transactions, or that damages or monetary relief may be claimed on account of the former provisions." 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.6 (1984); *see also Kirchberg v. Feenstra*, 450 U.S. 455, 459 n. 6, 101 S.Ct. 1195, 1198 n. 6, 67 L.Ed.2d 428 (1981); *Mookini v. Mann*, 503 F.2d 1171, n. 1 (4th Cir.1974), *cert. denied*, 420 U.S. 928, 95 S.Ct. 1127, 43 L.Ed.2d 400 (1975). In this case, the provisions of the old rule control any claims the plaintiffs may have against Alabama for back payments. That the eleventh amendment prohibits the district court from awarding back payments may not be dispositive of the issue of mootness of the claim for a declaratory judgment. The issue is of little import, however, since our decision in this case will require the district court to decide the validity of the rule in question.

differences surrounding the medical condition of each of the named Plaintiffs prevent these Plaintiffs from having claims or defenses which would be typical of those of all members of the putative class." The plaintiffs contend that the court misapplied the typicality requirement of Rule 23(a)(3) of the Federal Rules of Civil Procedure and, thereby, abused its discretion in refusing to certify the class. We agree.

[1, 2] Rule 23(a) specifies four prerequisites to maintaining a suit as a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Although the considerations of subsections a(2), a(3), and a(4) tend to overlap, *see De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225 (7th Cir.1983); 7 C. Wright & A. Miller, Federal Practice and Procedure § 1764 (1972), "subsection a(3) primarily directs the district court to focus on whether named representatives' claims have the same essential characteristics as the claims of the class at large." 713 F.2d at 232. Moreover, "[t]he typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members." *Id.; see also Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir.1975). Thus, courts have found that a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences. *See, e.g., De La Fuente*, 713 F.2d at 232; *Donaldson v. Pillsbury Co.*, 554 F.2d 825 (8th Cir.), *cert. denied*, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128 (1977); *Penn v. San Juan Hospital*, 528 F.2d at 1189; *Calkins v. Blum*, 511 F.Supp. 1073, 1088 (N.D.N.Y. 1981), *aff'd*, 675 F.2d 44 (2d Cir.1982); *Wilder v. Bernstein*, 499 F.Supp. 980, 992-993 (S.D.N.Y.1980).

[3] In this case the district court was concerned by the "vast factual differences surrounding the medical condition of each of the named Plaintiffs." These factual distinctions, however, have little or no relevance to the relief requested by the plaintiffs. In their complaint the plaintiffs asked that the court (1) declare the level of care criteria invalid, (2) order reinstatement of the previous criteria pending development of new criteria (the complaint was drafted before Alabama revised the challenged criteria), (3) declare the policies and customs of the defendants invalid, and (4) enjoin the defendants from determining any member of the class to be ineligible for benefits without full compliance with applicable federal law. It does not appear that the factual differences surrounding the medical conditions of the various plaintiffs would preclude the district court from determining whether the plaintiffs are entitled to the relief they seek. The similarity of the legal theories shared by the plaintiffs and the class at large is so strong as to override whatever factual differences might exist and dictate a determination that the named plaintiffs' claims are typical of those of the members of the putative class.[3]

3. Moreover, we note that "[i]n considering a motion under Rule 23(a)(3), the court should keep in mind that it has the authority under Rule 23(c)(1) and Rule 23(c)(4) to shape the

The defendants suggest, nevertheless, that the determination of typicality in this case is controlled by our decision in *Love v. Turlington*, 733 F.2d 1562 (11th Cir.1984). We do not agree. In that case we held that the district court did not abuse its discretion in denying class certification on the grounds that the plaintiffs failed to meet the commonality and typicality requirements of Rule 23(a). The plaintiff challenged the constitutionality of Florida's State Student Assessment Test, a basic skills test administered to all eleventh graders in the state. The test was designed to identify students who had not mastered one or more of the minimum performance standards defined in the applicable state regulations. Although students who failed the test were targeted for remedial assistance, the determination of whether a student failing the test was ultimately eligible for a diploma was made by individual teachers on the basis of the individual student's achievements. *Id.* at 1564. "Each student's situation differs, and the diploma is denied each student for reasons which are unique to his situation, and which do not necessarily correspond to his performance on the [test]." *Id.*

This case is, therefore, distinguishable from *Love* in that in *Love* a student's performance on the challenged test was only one factor among a number of other unrelated factors considered in determining the student's eligibility for a diploma. In this case, however, the challenged rule is the sole basis upon which the plaintiffs were denied Medicaid nursing home benefits. The Rule states specifically that "[a]ll new admissions to nursing care facilities for coverage under Medicaid must be prior authorized by Alalkod as meeting the medical need criteria outlined below." Rule 560-X-10.13(1), Alabama Medicaid Agency Administrative Code. In *Love* we noted the same sort of distinction we make today:

> Plaintiff's attempt to analogize this case to *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir.1981), in which class certification was granted, is unsuccessful because of the disparity between the uses and effects of the tests at issue in the two cases. *Debra P.* concerned the so-called SSAT-II or "functional literacy test," which determined whether or not high school students throughout Florida would receive diplomas, regardless of their academic records. Commonality and typicality were clearly present. In contrast, the [test involved in *Love*] simply identifies, for the purposes of remediation, those students who are substandard in certain areas.

733 F.2d at 1564. Because a failure to meet the criteria of the rule challenged by the plaintiffs in this case would mean a denial of Medicaid benefits, we think that the rule is more akin to the functional literacy test in *Debra P.*, the failure of which would render a student ineligible for a diploma, than the test in *Love*. Therefore, we cannot accept the defendant's argument that *Love* is dispositive of the issue of typicality in this case.

Finally, the defendants contend that even if the plaintiffs satisfied the requirements for maintaining a class action, the district court properly refused to certify the class

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economy of the action by allowing class treatment for only some of the issues or by dividing the original class into subclasses." 7 C. Wright & A. Miller, Federal Practice and Procedure § 1764 (1972). The district court, therefore, would not be required to refuse class certification even if one of the plaintiffs' claims failed, due to the varying medical conditions of the plaintiffs, to meet the typicality requirement of Rule 23(a)(3).

because class status is unnecessary for the plaintiffs to obtain the declaratory and injunctive relief they seek. They argue that since Alabama would conform its rules and conduct to the court's decree regardless of whether the action is maintained in class form, class certification would lead only to unnecessary expenditures of time and money in the course of the litigation. This argument ignores, however, that the plaintiffs have requested notice relief under *Quern v. Jordan*.[4] Indeed, the plaintiffs "would be unable to obtain classwide notice if no class action [is] certified since the other eligible recipients would not be parties to this litigation and would not be entitled to the benefits of the district court's judgment." *Mitchell v. Johnston*, 701 F.2d 527 (5th Cir.1983). Class certification is therefore necessary.

II. Quern v. Jordan Notice Relief

(4) The plaintiffs contend that they have a live claim for an order requiring the defendants to send a notice to the members of the putative class advising them that they were denied Medicaid nursing home benefits under invalid criteria and that a state administrative procedure is available to determine whether they are entitled to past benefits. They argue that this type of notice relief is specifically excepted from the application of the eleventh amendment by *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), and its progeny. The plaintiffs contend, therefore, that the district court should not have dismissed the action as moot and barred by eleventh amendment. We agree. We therefore vacate the district court's order dismissing the action and remand for the district court to consider the validity of the level of care criteria in question. If the district court determines, as the plaintiffs have alleged, that the criteria were invalid, it should design such notice relief as is consistent with this opinion and the authority of *Quern* and its progeny.

Quern was the sequel to the Supreme Court's decision in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). In *Edelman* the plaintiffs brought a class action seeking injunctive and declaratory relief against Illinois officials administering the federal-state program for Aid to the Aged, Blind, and Disabled, contending that the officials were administering the program in a manner inconsistent with various federal regulations and the fourteenth amendment. The district court declared certain state regulations invalid and granted a permanent injunction requiring compliance with the applicable federal regulations. The court also ordered the state officials to "release and remit benefits wrongfully withheld." The Court of Appeals for the Seventh Circuit affirmed the district court's decision.

The Supreme Court then reversed the Seventh Circuit, holding that the eleventh

4. Although the plaintiffs did not in their complaint request notice relief, we conclude that they sufficiently raised the issue in their Memorandum in Support of Motion for Determination that Action is a Class Action as to Plaintiffs:

> A class action is needed to require Akinkbol to give notice to the members of the class that their applications for Medicaid Nursing Home assistance were denied under invalid criteria and that they have the opportunity to reapply and be considered under the appropriate standards.... With regard to these individuals it is appropriate that they be given notice of the available state remedies for retroactive benefits pursuant to *Quern v. Jordan*.

The record indicates that the defendants were fully apprised of the plaintiffs' claim for notice relief and, in fact, submitted a detailed response to it.

amendment constitutes a bar to that portion of the district court's decree which awarded retroactive benefits. In distinguishing this type of relief from that approved by the Court in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Court noted that the relief in *Edelman* "requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation."

In *Ex Parte Young*, the watershed case of eleventh amendment jurisprudence, the Supreme Court held that the eleventh amendment did not bar a federal action seeking to enjoin the Attorney General of Minnesota from enforcing a statute alleged to violate the constitution. The Court's rationale for the decision was that it was not a suit against the state, which would fall under the eleventh amendment prohibition,[5] but against a state official in his individual capacity. It is clear, nonetheless, that the injunction issued in *Ex Parte Young* was not totally without effect on the state treasury. Noting that fact, the *Edelman* Court stated:

> The fiscal consequences to state treasuries in these [*Ex Parte Young* type] cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. *Such an ancillary effect is a permissible and inevitable consequence of the principle announced in Ex Parte Young.*

415 U.S. 667-668, 94 S.Ct. 1358 (emphasis ours). This analysis laid the predicate for the Court's decision in *Quern*.

After the Court's remand in *Edelman*, the district court ordered the Illinois officials to send to each member of the plaintiff class a notice stating: "You were denied public assistance to which you were entitled in the amount of _____." *Jordan v. Trainor*, 405 F.Supp. 802, 809 (N.D.Ill.1975). A "Notice of Appeal," which when signed and sent to the Illinois Department of Public Aid requested a hearing on the denial of benefits, was to be sent along with the notice.

The Seventh Circuit sitting en banc reversed the district court holding that the proposed form of notice would violate the eleventh amendment since it purported to decide that Illinois public funds should be used to satisfy the claims of the class members without the consent of the state. *Jordan v. Trainor*, 563 F.2d 873, 875 (7th Cir.1977) (*en banc*). In remanding the case, the Court of Appeals noted that a "mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits" would pass eleventh amendment muster. The court also stated that "[a] simple returnable notice of appeal form" could be included with the explanatory notice. *Id.* The basis of the court's approval of this form of relief was that it

5. The eleventh amendment provides:
> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

would not create a "liability" against the state. Whether a liability might result would be a matter for state determination, not the federal court. No federal judgment against the state would be created. Such a notice could not be labeled equitable restitution or be considered an award of damages against the state.

Id. at 976.

The Supreme Court then heard the case *sub nom. Quern v. Jordan* and affirmed the Seventh Circuit's proposed form of notice relief. The Court held that the notice relief "falls on the *Ex Parte Young* side of the eleventh amendment." 440 U.S. at 347, 99 S.Ct. at 1148. The Court refused to accept the petitioners' argument that the proposed notice would lead inexorably to the payment of state funds for retroactive benefits and, thereby, violate the eleventh amendment.

> Whether a recipient of notice decides to take advantage of those available state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court.

Id. at 348, 99 S.Ct. at 1149. Harking back to the language of the *Edelman* decision, the Court reasoned that "[t]he notice approved by the Court of Appeals, unlike that ordered by the District Court, is more properly viewed as ancillary to the prospective relief already ordered by the court." *Id.*

The plaintiffs contend that they have a live claim for *Quern* notice relief and, therefore, that the district court should not have dismissed their suit as moot and barred by the eleventh amendment. We agree. The defendants' only response to the plaintiffs' argument that they are entitled to *Quern* notice is that such relief is not available where the district court has properly denied class certification. However, because we have determined that the district court erred in denying class certification, the defendants' argument requires no further consideration.

We note, nevertheless, that this case presents another interesting issue: What is the meaning of the Supreme Court's statement in *Quern* that the notice relief "is more properly viewed as ancillary to the prospective relief already ordered by the court."[6] 440 U.S. at 349, 99 S.Ct. at 1149. It may be argued that the significance of the word "ancillary" in *Quern* goes beyond its meaning in *Edelman*, in which the Court referred to the costs to the state treasuries of complying with prospective orders as a permissible "ancillary effect." 415 U.S. at 668, 94 S.Ct. at 1358. In *Quern* "ancillary" ostensibly refers to the notice itself, not the cost of the notice. The case could therefore be interpreted as requiring that some actual injunctive, declaratory, or other prospective relief, aside from the notice itself, together with a concomitant determination that the defendants acted illegally, precede an award of notice relief. Subsequent case law and an analysis of the Court's reliance on *Milliken v. Bradley*, 433 U.S. 267, 290, 97 S.Ct. 2749, 2762, 53 L.Ed.2d 745 (1977), indicate, however, that the Court did not intend such a result.

In *Stiles v. Vowell*, 621 F.2d 649 (5th Cir.1980), *reh. en banc denied*, 625 F.2d 1016 (5th Cir.1980), *cert. denied*, 449 U.S.

6. Although not briefed, this point was raised and discussed at oral argument.

1138, 101 S.Ct. 141, 67 L.Ed.2d 111 (1981),[7] the plaintiffs brought a class action suit challenging the Texas incapacity eligibility standard for receipt of benefits under the Aid to Families with Dependent Children Program. As initially brought, the class action contested primarily the rule that disqualified the families of dependent children if the father was "capable of light work." During the course of the litigation Texas revised the rule, and the plaintiffs conceded that their claim for injunctive relief from the "capable of light work" requirement was thereby mooted. Nevertheless, even though the district court refused to award retroactive benefits, it certified the class and ordered the defendants to pay for preparing and mailing an explanatory *Quern*-type notice to the class members. The notice, which was approved by the parties, provided:

> The United States District Court for the Southern District of Texas, Brownsville Division, has ruled that the disability standard under which your application or claim for AFDC-I benefits may have been evaluated did not conform to federal standards. The Texas AFDC-I standard has now been changed. If you desire, you may file a new application for AFDC-I benefits. Your evaluation will be examined under the new standard. To file your application or to obtain further information, please contact your local office of the Texas Department of Human Resources.

On appeal, the Fifth Circuit approved this form of notice with some slight modification.[8]

In his dissent, Judge Tjoflat raised the concern that *Quern* relief may not be available where no other prospective relief has been granted:

> I cannot concur with the majority's approval of the district court's order requiring the defendants to bear the expense of preparing and mailing the explanatory notice to all class plaintiffs who have been denied AFDC benefits under the "capable of light work" standard. Ordinarily, a court has no power to grant relief, even equitable relief, once the claim for relief has become moot. The obvious reason is that an order granting relief may only follow a determination of liability; there can be no such determination where the claim is mooted.

621 F.2d at 686. This analysis presupposes, however, that *Quern* notice is some unnamed legal right that exists only ancillary to prospective relief rather than relief itself bearing ancillary costs.

Responding to Judge Tjoflat's dissent, the court stated that "[t]he plaintiffs' claim for a notice to the class was not mooted by the revision of the regulations, any more than a claim for pre-revision damages would have been." 621 F.2d at 631 n. 13. That conclusion is thoroughly logical. We cannot see any basis upon which to distinguish *Quern* notice from other forms of equitable relief permissible under the eleventh amendment. That a claim for injunc-

7. This case is, of course, binding precedent in this Circuit. Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding upon the Eleventh Circuit unless and until they are overruled by the Eleventh Circuit sitting en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

8. Because the court vacated the district court's ruling as to another of the rules in question violated the constitution, it limited the notice to only those class members who were denied benefits under the "capable of light work" requirement. 621 F.2d at 631.

tive relief becomes moot should not, therefore, moot a separate claim for Quern notice.

As the Stiles court noted, 621 F.2d at 652, this conclusion is borne out by an examination of the Supreme Court's citation of Milliken v. Bradley to support its statement that the notice "is more appropriately viewed as ancillary to the prospective relief already ordered by the court." 440 U.S. at 348, 99 S.Ct. at 1149. In Milliken the Supreme Court held that a decree that the state share in the future costs of educational components fit squarely within the prospective-compliance exception reaffirmed by Edelman. 433 U.S. 267, 289, 97 S.Ct. 2749, 2762, 53 L.Ed.2d 745 (1977). The Court's reliance on Milliken in Quern indicates, therefore, that it is the cost of the notice that is ancillary, not the notice itself.

We note that this conclusion also comports with an examination of the context of the statement in Quern that the notice is "more properly viewed as ancillary." That statement appears to be the conclusion of the Court's discussion of why the cost of sending the notice does not render it barred by the eleventh amendment. See Quern, 440 U.S. at 347–350, 99 S.Ct. at 1149–1150. We might restate the Court's language to provide that the notice relief is not barred by the eleventh amendment since the cost of that notice is more properly characterized as ancillary.

For the aforementioned reasons we vacate the district court's order denying class certification and dismissing the action, and we remand for further proceedings consistent with this opinion.

VACATED and REMANDED.

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No. 84-6270

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHNNY GREEN, ET AL., ETC., PETITIONERS

v.

AGNES MARY MANSOUR, Director, Michigan Department of Social Services, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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I. THE STEPPARENT CASE— BANAS v. DEMPSEY

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Civil Action No. 81-60077

CAROL BANAS

v.

JOHN T. DEMPSEY

RELEVANT DOCKET ENTRIES

Date	Proceedings
1981	
May 11.	Complaint filed. Summons Issued.
May 28.	Pltf's Motion for Preliminary Injunction
Jun 3	Notice of hrg. re: pltf's motion for preliminary injunction will be hrd. on 6/16/81 at 3:00 p.m.
June 16.	Affidavit of John T. Dempsey
June 16	Deft's Brief in opposition to Motion for Preliminary Injunction
June 16.	Affidaivt of Carol Drake
June 16	Pltf's Motion for Class certification
Jun 29	Order granting preliminary injunction. Taylor, J

Date	Proceedings
1981	
Jun 30.	Deft's Motion for Stay of Enforcement of Order granting Preliminary Injunction w.b.a. and notice of hearing set for July 2, 1981
Jul 1	Notice of hearing on motion for stay of enforcement of order granting preliminary injunction set for 8/3/81 at 9:30 am, Taylor, J
Jul 1.	Deft's Notice of Appeal
July 7.	Transcript of June 16, 1981
Aug 3.	Deft's Motion to stay denied. Taylor, J
Aug 6.	Order denying stay pending appeal Taylor, J
Oct 21.	Stipulation to amend Order granting Preliminary Injunction
Oct 27.	Order from CCA appeal dismissed.
Oct 21.	Order amending preliminary Injunction Taylor, J
Dec. 29	ORDER OF REASSIGNMENT TO ANN ARBOR. Feikens, J.
1982	
Jan. 29	Pltfs' Notice of Hearing for MOTION for Class Certification set for 3/16/82 @ 2:30, PS.
Feb 24	Pltf's Notice of Hearing for MOTION for Class Certification & MOTION for Summary Judgment set for 4/13/82 @ 2:30,
Mar. 19	Deft's MOTION to Dismiss, BA, Exhibits, & PS. Notice of Hearing set for 4/13/82 @ 2:30.
Apr. 1	Pltf's Brief in Opposition to MOTION to Dismiss, Attachments & PS.
Apr. 9	Pltfs' MOTION for Summary Judgment, BA, Aff. of Edward Hoort, Exhibits & PS. No Hearing scheduled.

Date	Proceedings
Apr. 13	Deft, Dept. of Social Service's Brief in Opposition to MOTION for Class Certification and in opposition to plft's MOTION for SJ, Exhibits & PS.
Apr. 13	Pltf's Motion for SJ hrd/TAKEN UNDER ADVISEMENT
	Deft's Motion to Dismiss hrd/TAKEN UNDER ADVISEMENT
	Pltf's Motion for Class Certification hrd/TAKEN UNDER ADVISEMENT
June 23	MEMORANDUM OPINION and Order granting deft's Motion to dismiss and Dismissing Pltf Mot S/J and Joiner, J Mot. for Class Certification is moot.
June 23	JUDGMENT—That Pltfs' take nothing, and that the action be dismissed on the merits, with prejudice.
July 22	Pltfs' Notice of Appeal from final judgment entered on 6/22/82.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 81-71494

CAROL BANAS, MICHAEL K. KELLEY, LINDA I. KELLEY, AMELIA VAN BURGER, TERESA E. COVEYOU, MARY MADELENE JONES, JOHN J. KIEVER, GILDA MILLS and JUDGE MILLS, on behalf of themselves, their children, and all others similarly situated, PLAINTIFFS

v.

JOHN T. DEMPSEY, individually and in his official capacity as Director of the Michigan Department of Social Services, DEFENDANT

COMPLAINT

1.) Plaintiffs bring this action to enjoin the Defendant from terminating the benefits of recipients of Aid to Families with Dependent Children (AFDC) because the Defendant presumes the income and resources of a stepparent to be available for the stepchildren. This action by the Defendant is in direct violation of several statutory mandates, several federal regulations, and two provisions of the United States Constitution.

JURISDICTION

2.) The jurisdiction of this Court is invoked pursuant to 42 USC 1983 and its jurisdictional counterpart, 28 USC 1343 and 28 USC 1331. Declaratory and injunctive relief is sought pursuant to 28 USC 2201 and 2202.

PARTIES

3.) Plaintiff Carol Banas is a recipient of AFDC and currently resides in Madison Township, Michigan.

4.) Plaintiff Banas, is responsible for the support and custody of her three children, Ronald Bevan Jr., Kristine Bevan and Wendy Bevan.

5.) Plaintiffs Michael and Linda Kelley are residents of Wayne County, Michigan. Linda is a recipient of AFDC.

6.) Linda Kelley is responsible for the support and custody of her four children, Mark O'Brien, Jennifer O'Brien, Amanda O'Brien and Jacob O'Brien.

7.) Plaintiff Amelia Van Burger is an AFDC recipient and resident of Eaton County, Michigan.

8.) Plaintiff Van Burger is responsible for the support and custody of her children, Vanessa and Valerie Megenuph.

9.) Plaintiff Van Burger is also jointly responsible with her husband James Van Burger for the support of their child Seth Van Burger.

10.) Plaintiff, Teresa Coveyou is a recipient of AFDC and a resident Emmett County, Michigan.

11.) Plaintiff Coveyou is presently responsible for the support and custody of her children Teresa Sabin, Dorothy Sabin, Johnny Sabin, Gordon Sabin Jr., Robert Sabin and David Sabin.

12.) Plaintiff Coveyou and her husband, Jan Coveyou are responsible for the support and custody of Terrence Coveyou and Eric Coveyou.

13.) Plaintiff Mary Madelene Jones is a recipient of AFDC and a resident of Wayne County, Michigan.

14.) Plaintiff Jones is responsible for the support and custody of her children, Stanley Barnes, Keith Barnes, Dante Barnes, Aaron Barnes, and Joseph Barnes.

15.) Plaintiff John J. Kiever is a recipient of AFDC and a resident of Kent County, Michigan.

16.) Plaintiff Kiever is responsible for the support and custody of his children Dana Kiever, Terry Kiever, Patrick Kiever, and Cherie Kiever.

17.) Plaintiffs Gilda and Judge Mills are residents of Washtenaw County, Michigan. Gilda is a recipient of AFDC.

18.) Plaintiff Gilda Mills is responsible for the support and custody of her children, Laytona Caston and Kanisha Caston. Plaintiffs Gilda and Judge Mills are jointly responsible for the support and custody of their twins, Jolena and Jovan Mills.

19.) Defendant John T. Dempsey is the Director of the Michigan Department of Social Services and as such is responsible for the policies, practices and administration of the AFDC program.

CLASS

20.) Plaintiffs bring this action on behalf of themselves, their children and the class of all persons similarly situated. The class consists of all persons who live in households which will have their AFDC benefits terminated or reduced because of the presence of a stepparent.

21.) The class consists of two subclasses, those AFDC recipients who will have their benefits terminated or reduced because of the presence of a stepparent in the home, and a second subclass consisting of those stepparents who are married to AFDC recipients.

22.) The class and subclass are so numerous that joinder of all members is impracticable.

23.) There are questions of law or fact common to the class and subclasses.

24.) The claims or defenses of the representative are typical of the claims and defenses of the class and subclasses.

25.) The named plaintiffs will fairly and adequately protect the interests of the class and subclass.

26.) The parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

FACTS

27.) Plaintiff, Carol Banas was married in August of 1977 to James W. Banas.

28.) Plaintiff Banas has three children by a previous marriage, Ronald Bevan Jr., Kristine Bevan, and Wendy Bevan.

29.) Plaintiff Banas receives AFDC and Medicaid benefits for her children. She does not receive any assistance for herself.

30.) Plaintiff's husband, James Banas is employed as an appliance salesman and currently averages a gross income of $275.00 per week. He has work expenses which average $300 per month.

31.) Plaintiff Banas' children have costly medical conditions including allergy and spinal problems.

32.) Plaintiff Banas will suffer extreme financial hardship if she can no longer receive AFDC for her children.

33.) Plaintiff Banas may be unable to provide medical care for her children if she can no longer receive Medicaid for her children.

34.) Plaintiffs Michael and Linda Kelley were married in July of 1980.

35.) Plaintiff Linda Kelley has four children by a previous marriage; Mark O'Brien, Jennifer O'Brien, Amanda O'Brien and Jacob O'Brien.

36.) Plaintiff, Linda Kelley receives AFDC and Medicaid benefits for her children. She does not receive any benefits for herself.

37.) Plaintiff Michael Kelley has two children from a previous marriage for whom he pays child support.

38.) Plaintiff Michael Kelley's first wife has remarried, but her husband is not legally responsible for the children.

39.) Plaintiff Van Burger was married to James Van Burger in 1973. They have one child Seth Van Burger.

40.) Plaintiff Van Burger has two children by a previous marriage; Vanessa Megenuph and Valerie Megenuph.

41.) Plaintiff Van Burger receives AFDC and Medicaid for the two Megenuph children. She does not receive any benefits for herself.

42.) Plaintiff Van Burger, provides for the support of the two Megenuph children without assistance from Mr. Van Burger.

43.) Plaintiff Van Burger will suffer severe financial hardship if she can no longer receive AFDC and Medicaid for her children.

44.) Plaintiff Teresa Coveyou, is married to Jan Coveyou.

45.) Plaintiff Coveyou has seven children by a previous marriage, Teresa Sabin, Dorothy Sabin, Johnny Sabin, Gordon Sabin, Jr., Robert Sabin, David Sabin and Sandra Sabin.

46.) Plaintiff Coveyou receives AFDC and Medicaid benefits for the first 6 children listed above. Sandra Sabin does not receive benefits as she does not live in the household. Plaintiff Coveyou does not receive any benefits for herself.

47.) In addition to the Sabin children, Jan Coveyou has two children who reside in the household.

48.) Jan Coveyou contributes to the support of three of his children who do not live in the household.

49.) Plaintiff Coveyou contributes to the support of one of her children who does not live in his household.

50.) Plaintiff Coveyou's husband is employed with a gross income at approximately $15,000 per year. He has work expenses of approximately $930 per year.

51.) Plaintiff Coveyou is suffering grave financial difficulties and marital disharmony as a result of Defendant's policies.

52.) Plaintiff Jones was married to Stanley Allen in October of 1980.

53.) Plaintiff Jones receives AFDC and Medicaid benefits for her children. She does not receive any benefits for herself.

54.) Mr. Allen does not financially support Plaintiff Jones' children, and will terminate the marriage if he is required to do so.

55.) Plaintiff Jones will suffer great financial hardship and the loss of her marriage if Mr. Allen is required to support her children.

56.) Plaintiff John Kiever is currently married to Ivena Kiever.

57.) Plaintiff Kiever has four children from a previous marriage, Dana Kiever, Terry Kiever, Patrick Kiever and Cherie Kiever.

58.) Plaintiff Kievers' wife is employed, but she refuses to reveal her income to Plaintiff.

59.) Plaintiff Kiever's wife refuses to contribute to the support of the Plaintiff's children.

60.) Plaintiff Kiever's family will be destroyed through divorce or separation if Plaintiff's wife is forced to support his children because of the actions of the Defendant.

61.) Plaintiff Kiever is unable to provide support for his children because of the actions of the Defendant.

62.) Plaintiffs Gilda and Judge Mills were married in June of 1980.

63.) Plaintiff Gilda Mills has two children who are not the children of Judge Mills, Layton Caston and Kanisha Caston.

64.) Plaintiffs Gilda and Judge Mills have two children, Julena and Jovan Mills, born April 6, 1981.

65.) Plaintiff Gilda Mills receives AFDC and Medicaid benefits for Laytona and Kanisha Caston. No benefits are received for any other member of the household.

66.) Plaintiff Judge Mills is employed as a maintenance worker, and receives a net income of $867.00 per month.

67.) Plaintiff's Gilda and Judge Mills will suffer severe financial hardship if Defendant is allowed to terminate their AFDC and Medicaid.

68.) Public Act No. 480, an act to amend Section 2 of the Michigan Poor Law MCLA 401.2, (hereafter referred to as "Act 480) was approved on January 20, 1981, and requires that

> the stepparent of a dependent child who lives in the same household as the dependent child being of sufficient ability, shall . . . support the dependent child, in the manner approved by . . . the department of social services. . . .

69.) Section 1 of the Michigan Poor Law, MCLA 401.1, defines a "dependent child" to mean "a poor person under 18 years of age." A "poor person" is defined in the same section in relevant part as "a person who. . . is eligible to receive relief or assistance granted under the provisions of the Social Welfare Act.

70.) Based upon the provisions of Act 480, the Defendant Dempsey promulgated policy applicable to Michigan's AFDC program which require that AFDC eligibility or grant levels of stepchildren under the age of 18 who live in the same household as their stepparent, be determined after considering the income and resources of such stepparent, regardless of whether such income or resources are in fact being made actually available to such stepchildren. See Assistance Payments (AP) Manual Bulletin 81-5 and revised Item 208 transmitted therewith, attached to this Complaint as Exhibit 1.

71.) In addition to deeming income and resources available, Item 208 does not allow stepparents to deduct the actual costs of producing earned income and does not provide for any work incentive disregard of portions of earned income, as are normally allowed for all other caretaker relatives whose needs and income are considered in determining eligibility and grant levels for AFDC.

72.) Plaintiffs, who are all parents and stepparents of dependent children whose eligibility is to be determined or amount of AFDC benefits reduced as a result of Act 480 and Defendant's policies promulgated thereunder, face

immediate and irreparable harm if Defendant's policies are not enjoined by this Court.

FIRST CLAIM FOR RELIEF

73.) Defendant is required by federal law to aid all children defined as "dependent children" according to federal standards. 42 USC § 606, § 607, and § 602(a)(10).

74.) Federal law requires that, in determining financial eligibility and the amount of assistance for a dependent child, Defendant must count only such net income and resources as are actually available for the support of such child. 42 USC § 602(a)(7); 45 CFR § 233.90(a)(1) and 45 CFR § 233.20(a)(3)(ii)(D) (1980).

75.) Whether in determining financial need or categorical eligibility of a dependent child, Defendant may not assume the availability of income or resources of a stepparent unless such a stepparent is legally obligated to support his or her stepchildren

> under a state law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

45 CFR § 233.90(a)(1) (1980).

76.) Act 480, amending MCLA 401.2 does not impose a legal obligation of the sort contemplated by the Social Security Act and regulations; therefore AP Manual Bulletin 81-5 and Item 208 violate the cited provisions of the Social Security Act and regulations.

SECOND CLAIM FOR RELIEF

77.) Act 480 proports to impose a duty of support upon stepparents who live in the same household as a "dependent child," defining such a child to be a child eligible AFDC or other "relief or assistance granted under . . . sections 400.1 to 400.121 of the Michigan Compiled Laws," the Social Welfare Act.

78.) As a result of Act 480, a support obligation is imposed upon persons who are married to natural or adoptive parents of children eligible for AFDC, but no such support obligation is imposed upon persons who are married to natural and adoptive parents whose children are not eligible for AFDC.

79.) Act 480 thereby violates the rights of stepparents of "dependent children" to equal protection of the laws by singling them out for special legal burdens without any rational basis therefor.

80.) Because Act 480 is unconstitutional and therefore void, the obligation imposed by it does not qualify as a "legal" one under 45 CFR § 233.90(a)(1)(1980); consequently Defendant's policies, set forth in AP Manual Bulletin 81-5 and Item 208, violate the sections of the Social Security Act and regulations set forth in the First Claim for Relief.

THIRD CLAIM FOR RELIEF

81.) Act 480 purports to impose a support duty on "the stepparent of a dependent child who lives in the same household" and, based upon such support duty, the Defendant has promulgated welfare policy resulting in total or partial ineligibility of otherwise eligible dependent children based upon the stepparent's residence in the home and marriage to such children's mother.

82.) The only ways AFDC stepparents can avoid the said support duty and termination or reduction of the AFDC grant of the dependent children in the home are for the stepparent to move out of the home or obtain a divorce, or, in the event that the natural or adoptive parent and would-be stepparent are not yet married, to avoid getting married.

83.) The above financial and other pressures resulting from the operation of Act 480 and Defendant's Item 208 constitute an impermissible burden upon Plaintiffs' right of family privacy, right to marry and right of association guaranteed by the due process clause of the Four-

teenth Amendment and the First and Ninth Amendments, and serve to single out Plaintiffs for special treatment with respect to the exercise of their said privacy and associational rights without any rational basis in violation of their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

FOURTH CLAIM FOR RELIEF

84.) Defendant's welfare policies generally allow dependent children and their caretaker relatives to deduct from gross earned income all actual expenses of producing that income and allow an earned income disregard for persons qualified to receive one. AP Manual Item 331.

85.) Item 208 purports to count 80% of the gross earnings of a stepparent and does not allow for any work expense deductions or earned income disregards.

86.) In the alternative to the other claims herein and in the event that it is determined that stepparents' income may be counted for AFDC purposes, Defendant's failure to allow earned income deductions and disregards violates 42 USC § 602(a)(7) and (8) and the federal regulations thereunder and draws distinctions among persons included in the AFDC group without any rational basis, in violation of the equal protection clause of the United States Constitution.

WHEREFORE, Plaintiffs pray that this Honorable Court;

a. assume jurisdiction of this matter;

b. certify this action as a class action;

c. declare the Defendant's policies and practices as set forth above to be volative of federal statutory and constitutional provisions;

d. enjoin Defendant from continuing to enforce his policy regarding stepparents;

e. notify all members of the class of their rights to administrative review under state procedures;

f. award plaintiffs their costs and attorneys fees pursuant to 42 USC 1988; and

g. grant such further and equitable relief as this Court may find just in the circumstances.

Respectfully submitted,

/s/ William Burnham
WILLIAM BURNHAM
Wayne State University Law School
Detroit Michigan

/s/ Edward J. Hoort
EDWARD J. HOORT
Michigan Legal Services
Detroit, Michigan 48226

/s/ EDWARD J. HOORT (for)
PAUL D. REINGOLD
Legal Services of Southeastern Michigan
Ann Arbor, Michigan 48104

Dated: May 11, 1981

STATE OF MICHIGAN)
)
COUNTY OF INGHAM)

AFFIDAVIT OF AMELIA VAN BURGER

Affiant, Amelia Van Burger, having first been duly sworn, hereby states as follows:

1. She is the mother of two children, Vanessa Megenuph, age 12, and Valerie Megenuph, age 11, who reside with her.

2. Prior to March 1981, she received an ADC grant from the Michigan Department of Social Services (herein after: MDSS) of $91.00 per month for each child. She received this assistance because of the absence of the children's natural father, Warren Megenuph.

3. She is married to James Van Burger, and they reside at 3646½ Third Street, Grand Ledge, Eaton County, Michigan. They have one child, Seth Van Burger, age 5, who resides with them. The two Megenuph children also reside with them at this address.

4. She received a letter from the Eaton County Department of Social Services (herein after: ECDSS) dated February 13, 1981 (attached hereto as appendix # 1) stating: "Act 480, P.A. 1980, amended the Poor Law to require that step-parents are responsible relatives to minor children living in the same home." This letter further stated: "Effective 3-1-81, A.P. Workers must include the step-parents' income and assets when determining a step childs' eligibility for ADC." This letter directed her to complete an enclosed MDSS application form providing information on her husband including his income and assets. She and her husband completed such application and returned it to the ECDSS.

5. She received a form DSS-176 from the ECDSS dated February 24, 1981 (attached hereto as appendix # 2) notifying her that the two Megenuph children's assistance

under the ADC program would be cancelled effective March 10, 1981.

6. The reasons given on this DSS-176 form for this cancellation were: "Act 480, P.A. 1980, amended the Poor Law to require that step-parents are responsible relatives to minor children living in the same house. The value of your non-exempt property is higher than the maximum allowed for this program."

7. Upon contacting the ECDSS, she was informed that, based upon the information provided in the recently submitted MDSS application, the eligibility of the Megenuph children for ADC and Medicaid assistance was terminated.

8. She was informed by the ECDSS that the eligibility of the Megenuph children for ADC and Medicaid assistance was calculated as follows:

(a) The ADC assistance for the two Megenuph children prior to March, 1981, was $91.00 per month for a total of $182.00 per month.

(b) The income of James Van Burger was determined to be $300.00 per week for a total of $1,200 per month.

(c) 20% of Mr. Van Burger's income was disregarded leaving a balance of $960.00 per month considered available to him.

(d) The amount of Mr. Van Burger's income necessary for the personal needs of himself, Mrs. Van Burger (the affiant) and their son, Seth Van Burger, was computed as $73.00 per month for each of them for a total of $219.00 per month.

(e) Allowance for shelter, heat, and utilities for Mr. and Mrs. Van Burger and Seth would be $160.00 per month for shelter, $77.00 per month for heat, and $33.00 per month for other utilities.

(f) Thus the total amount of Mr. Van Burger's income allowed for the personal needs, shelter, heat and utilities for himself, his wife, and their son was $489.00 per month.

(g) When this amount was deducted from Mr. Van Burger's income considered available to him of $960.00 per month, a remainder of $471.00 per month was considered available for Mr. Van Burger to support the two Megenuph children.

(h) Because this amount of $471.00 per month of available income exceded the $181.00 per month that the two Megenuph children were receiving in ADC assistance, these children were no longer eligible for their ADC assistance.

9. She was also informed that in the ADC application she recently submitted, it was stated that Mr. Van Burger had a $3,000.00 savings account solely in his own name.

10. Because this savings account exceded the $2,000.00 asset limit for receipt of ADC assistance, and because Mr. Van Burger's assets were considered in determining the ADC eligibility of the two Megenuph children, these children would no longer be eligible for their ADC assistance.

11. She was informed by the ECDSS that because the two Megenuph children were no longer eligible for ADC assistance, they would also no longer receive Medicaid assistance.

12. She was never informed that Mr. Van Burger's actual work related expenses or his mandatory payroll deductions could be considered in calculating the eligibility of the two Megenuph children for ADC and Medicaid assistance.

13. In calculating the eligibility of the two Megenuph children for ADC and Medicaid assistance, no consideration was given of the actual expenses and obligations incurred by Mr. Van Burger for shelter, heat, and other utilities.

14. She and Mr. Van Burger were married in 1973 and the two Megenuph children have resided with them since then. In that period she has had the responsibility of supporting the two Megenuph children without assistance from Mr. Van Burger.

15. The termination of the ADC and Medicaid assistance for the two Megenuph children is a severe handicap and will cause many difficulties in providing adequate support for herself, Mr. Van Burger, Seth Van Burger and Vanessa and Valerie Megenuph.

Further Affiant sayeth not.

/s/ Amelia Van Burger
AMELIA VAN BURGER

Subscribed and sworn to before me this —— day of March, 1981.

/s/ Kathryn E. Berry
Notary Public Clinton County
State of Michigan
My Commission expires June 11, 1984

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES
JOHN T. DEMPSEY, *Director*

Feb. 13, 1981

Amelia S Vanburger
3646 ½ Third St
Grand Ledge MI. 48837

Act 480, P.A. 1980, amended the Poor Law to require that stepparents are responsible relatives to minor children living in the same home.

Effective 3-1-81, AP workers must include the stepparents' income and assets when determining a stepchilds' eligibility for ADC. Although stepparents must provide information regarding their income and assets in order to determine eligibility for their spouses and stepchildren, they may elect not to be included in the ADC group. Stepparents choosing to be included in the ADC group must meet all eligibility requirements.

In order to determine your continued eligibility it will be necessary for you to complete the enclosed application and return the application to this office no later than 2-27-81. When completing the application be sure to list all family members and answer all questions. A self-addressed, stamped envelope is enclosed for your convenience in returning the application.

When the completed application is received in our office, if additional information or verification is required, you will be contacted.

Yours Truly,

/s/ Nancy Foder
AP Worker
Eaton Co. Dept. Social Services

CLIENT NOTICE

Michigan Department of Social Services

Amelia Van Burger
3646 ½ Third St.
Grand Ledge, Mi. 48837

After careful review of your case, it has been determined that the actions checked below will be taken.

☐ Your application for assistance under ———— program is denied.

☒ Your assistance under the ADC program will be cancelled effective 3-10-81.

☐ Your assistance under the ———— program will be cancelled effective ————, however, you remain eligible for Medical Assistance.

☐ Your ADC grant will be reduced to $———— per month effective ————; no change in your Medical Assistance.

☐ Your GA grant will be reduced to $———— per month effective ————; no change in your GA Medical.

☐ Your Medical Assistance is continued; however, the amount which you must pay to the long term care facility will be $———— per month beginning ————.

☐ You will receive a separate notice about changes in your eligibility for other programs.

☐ Other (specify) ————.

The above action is being taken for the following reason: "Act 480, P.A. 1980, amended the Poor Law to require that stepparents are responsible relatives to minor children living in the same home." The value of your non-exempt property is higher than the maximum allowed for this program.

Manual policy reference: AP Item(s) 208,211 GA Chapter(s) ———— MAE Item(s) ————.

If your assistance is being denied or cancelled, you may reapply for assistance if your circumstances change.

If you do not understand why the above action is being taken, please contact me. If you wish, you may meet with me and my supervisor to discuss the reason for the action.

If you feel the action is incorrect, you have the right to a hearing. You may request a hearing within 90 days of the date of this letter. SEE THE OTHER SIDE OF THIS LETTER FOR INSTRUCTIONS FOR REQUESTING A HEARING. If you are currently receiving assistance and you request a hearing before 3-10-87, your assistance will continue at its present level at least until the hearing takes place.

AP Worker—[Illegible]

Telephone Number—343-0860

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

AFFIDAVIT OF JOHN T. DEMPSEY

STATE OF MICHIGAN)
) ss:
COUNTY OF WAYNE)

JOHN T. DEMPSEY, being first duly sworn, deposes and says as follows:

1. That he is the Director of the Michigan Department of Social Services.

2. That this affidavit is made on the personal knowledge of affiant, John T. Dempsey, who if sworn as a witness can testify competently to the facts contained herein.

3. That he is submitting this affidavit in opposition to Plaintiffs' motion for preliminary injunction in the above-captioned matter.

4. That as Director of the Department of Social Services, affiant is charged with the responsibility of administering the Aid to Families with Dependent Children (AFDC) and medical assistance (Medicaid) programs in Michigan as well as insuring that the Department does not spend in excess of the funds appropriated to it by the state legislature each fiscal year.

5. That on April 1, 1980, the Department implemented an essential person's policy in AFDC for needy spouses of eligible caretaker relatives. These individuals, which includes stepparents, are not eligible for AFDC in their own right but are considered by the state as essential for the well-being of the child recipient. As such, they may

have their needs and their resources considered in the determination of the family's AFDC benefit.

6. That on January 20, 1981, the Governor signed Act 480, an amendment to the Michigan Poor Law. This act requires stepparent, who lives in the same home as the dependent child, to contribute to the support of that child. Policy implementing Act 480 was developed and given an effective date of February 15, 1981 for active cases and March 1, 1981 for new cases.

7. That in anticipation of the passage of a stepparent responsibility law, the Legislature reduced the department's appropriation for FY 1980-81 by $16.8 million, out of which $8.4 million are state dollars. This reduction was predicated on the assumptions that the new stepparent policy would close 13,743 AFDC cases and that the savings from these closures would accrue beginning January 1, 1981.

8. Since the policy was implemented, the Department estimates that it has saved from grant reductions, case closures and new cases where eligibility was denied a total of approximately 3.6 million dollars through May 31, 1981. During the same time period, the Department estimates that the essential persons policy when applied to stepparents has increased expenditures by approximately 0.8 million dollars. This leaves an overall cost savings of about 2.8 million dollars or .93 million dollars per month.

9. That projecting the cost saving estimates for the remainder of the fiscal year, or an additional four months at the estimated rate of savings would provide additional savings of approximately 3.72 million dollars for a total projected fiscal year savings of about 6.5 million dollars leaving a shortfall from the budgeted figure of 10.3 million dollars.

10. That Mich. Const. art. IX, § 17, requires that, "[n]o money shall be paid out of the state treasury except in pursuance of appropriations made by law.

11. That the funds appropriated for FY 1980-1981 to the Department of Social Services are already insufficient

to meet current and projected expenditures for the fiscal year. This budgetary shortfall has already required the Department to take the following actions relating to the AFDC program in 1981 to live within appropriated funding:

a) recision of 1979 AFDC heating allowance increase January, 1981.

b) 2½ ratable reduction in AFDC payment standards effective April 1, 1981

c) additional 5% ratable reduction in AFDC payment standards effective June 1, 1981

12. That if this Court were to enjoin the Department's implementation of Act 480 through its policy contained in AP Manual Item 208, affiant has been advised by Gerald Miller, Director, Department of Management and Budget that supplemental appropriations requests are not to be made and as a result affiant has taken the action, with the approval of the legislative appropriations committees of ratably reducing AFDC standards as described above.

13. That, to offsset the fiscal impact of a preliminary injunction in this case an additional ratable reduction of 4.7% in AFDC payment standards for FY 1980-81 would be required (such ratable reduction could not go into effect until August 1, 1981).

/s/ John T. Dempsey
JOHN T. DEMPSEY
Director
Michigan Dept. of Social Services

Subscribed and sworn to before me
this —— day of June, 1981

/s/ Illegible signature
Notary Public, ——— County,
Michigan
My commission expires: ————

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

ORDER GRANTING PRELIMINARY INJUNCTION

At a session of said Court held in the
City of Detroit, Michigan, on the ——
day of June, 1981.

PRESENT: Honorable Anna Diggs Taylor
U.S. District Judge

The Court having before it Plaintiffs' motion for preliminary injunction, brought pursuant to Rule 65 of the Federal Rules of Civil Procedure, and having heard oral arguments of the parties and read the briefs and affidavits submitted by the parties, and having issued an oral opinion on June 16, 1981 containing the findings of fact and conclusions at law, recited in part below, as required by Rule 52 of the Federal Rules of Civil Procedure;

The Court finds as follows:

1) Plaintiffs have shown a strong or substantial likelihood of success on the merits inasmuch as it appears that Public Act 480 of 1980, MCLA 401.2 and the Defendant's policy as found in Assistance Payments Manual Item 208, require the assumption of income from a stepparent for the purpose of calculating Aid to Families with Dependent Children (AFDC) benefits and it appears that presuming income to be available for such purpose is violative of 42 U.S.C § 602(a)(7) and the regulations promul-

gated thereunder, 45 C.F.R. 233.90(a)(1) because Public Act 480 of 1980, MCLA 401.2 is not a law of general applicability which legally obligates stepparents to support their spouse's children to the same extent that natural and adoptive parents are obligated to support their natural and adoptive children.

2) Plaintiffs have shown irreparable harm absent injunctive relief as evidenced by the loss of monetary benefits, medical care and the inability of this Court, under the Eleventh Amendment to the United States Constitution, to award retroactive benefits to be paid.

3) The issuance of the injunction will not cause substantial harm to others which could not have been anticipated by Defendant in adopting said policy.

4) Public policy as expressed by the United States Congress and the Department of Health and Human Services would best be served by the issuance of this injunction.

IT IS HEREBY ORDERED that, pending the final resolution of this case on its merits or until further order of the Court, the Defendant is preliminarily enjoined from assuming the availability of stepparent's income for the purpose of calculating AFDC benefits pursuant to Assistance Payments Manual Item 208.

IT IS FURTHER ORDERED that Defendant be and is hereby preliminarily enjoined from terminating, reducing, or denying AFDC or Medicaid benefits by reason of the assumption of the availability of stepparent's income to applicants or recipients of such benefits from and after the effective date of this order.

IT IS FINALLY ORDERED that Defendant, beginning in and for the month in which this order takes effect shall take the following actions:

(A) Reinstate all AFDC and Medicaid cases heretofore terminated because of the above enjoined policy;

(B) Raise all AFDC and Medicaid grants reduced because of the enjoined policy to their appropriate levels, and

(C) Re-evaluate the eligibility of AFDC and Medicaid applicants who were denied benefits solely by reason of the Defendant's use of Assistance Payments Manual Item 208 as modified because of the passage of 1980 PA 480.

/s/ Anna Diggs Taylor
Hon. ANNA DIGGS TAYLOR
U.S. District Judge

APPROVED AS TO FORM:

/s/ Edward J. Hoort
EDWARD J. HOORT

/s/ Robert N. Rosenberg
ROBERT N. ROSENBERG

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

TRIAL PROCEEDINGS BEFORE JUDGE TAYLOR ON JUNE 16, 1981

* * * *

[2] THE COURT: The Court will enter a preliminary injunction as requested by the plaintiffs in this matter and will at this time outline its findings of fact and conclusions of law in which it is basing its order.

It appears undisputedly that on March 1, 1981, defendant John Dempsey effectuated a policy in the Michigan Department of Social Services to enforce and implement certain state legislation which is Public Act 480 of 1980 being MCLA Section 402.1.

That statute required, as does the policy, that step-parents be deemed responsible for the support of the child under eighteen who would be eligible for welfare and who lives in the same household as the step-parent. The statute is entitled "An Amendment to the Michigan Poor Law".

The plaintiffs here assert that the departmental policy as implemented in the current Assistance Manual, Item number 208 apparently is in violation of 42 USC Section 602(a)(7) and the regulations which the Department of Health and Human Services have promulgated pursuant to 45 C.F.R. Section 223.90(A)(1).

Plaintiff has requested an injunction [3] preventing the defendant from withholding any benefits pursuant to this new policy.

The suit is brought pursuant to 42 USC 1983, and alleges violation of the Federal Social Security Act, Equal Protection guarantees of our Constitution, violation of the right to family privacy. And the Court finds that it has jurisdiction under 28 USC 1343, 1331, 2201 and 2202.

The Court finds first that on the matters which are before the Court today, (and it must acknowledge it only received the defendant's brief this morning) and although the parties have argued extensively, there is a possibility of the law becoming clarified in a different direction later. But at this point, it appears highly likely that the plaintiffs will prevail on the merits.

42 USC section 602(a)(7) sets out the guidelines that the states are to follow in calculating income and resources of AFDC families.

Broadly, that statute declares that the income of a child being assisted shall be counted, insofar as that income is "actually available for current use".

The regulations promulgated, pursuant to the law, and most particularly, 45 C.F.R. section 233.20, are purposed to assure that the amount of the assistance actually paid is based on the individual's actual need.

[4] A state generally, the cases have held, may not presume the availability of income from an unrelated member of the household unless the income and the resources of that unrelated individual are in fact being made available to the AFDC child.

Two leading cases in the area are *King v. Smith* 392 US 309 and *Lewis v. Martin* 397 US 552.

In the *King* case the state of Alabama attempted to define any single or married able-bodied man, with whom an AFDC mother co-habited as a "substitute father", and proceeded to deny benefits to children in such homes on the basis of their not being deprived of a parent.

The Supreme Court has struck those regulations down as violative of the Social Security Act's definition of a parent.

After *King*, the Department of Health, Education and Welfare promulgated the rules on this subject which are here in litigation; in response to the Supreme Court's holding in *King*.

The regulation in essence provides that the presence of parental support can only be found, in the case of a step-parent, where the step-parent is lawfully married to the child's natural parent and is legally obligated to support the child under a state law of general applicability, [5] which requires the step-parent to support the step-child to the same extent that the natural or adoptive parents are required to support their children.

The case of *Lewis v. Martin* has reinforced the promulgations of Health, Education and Welfare; it was decided subsequent thereto and struck down California statutes somewhat similar—which this Court finds to be somewhat similar to the case here at bar in Michigan.

The Michigan statute, (the "Poor Law") the plaintiffs argue in this court, and this Court finds on the record before it, is not a statute of general applicability, but establishes duties of support which differ—and special welfare duties of support which differ from the normal duties of support which natural and adoptive parents have in the state of Michigan.

The Michigan statute provides that a step-parent of a step-child who lives in the same household as a step-child, being of sufficient ability, shall jointly or severally relieve, maintain and support the step-child in the manner approved by the county Department of Social Services on the county in which the poor person is settled or living.

It goes on to provide that the obligation of the step-parent may be enforced, by the county Department [6] making application to the Probate Court for an order to complet such relief through the prosecuting attorney.

The statute defines a dependent child as a poor person under eighteen years of age, and defines a poor person as one eligible to receive relief.

Therefore, the duty of a step-parent is limited to step-children under eighteen living in the home with the step-parent and, who are eligible for welfare.

In contrast, the duties of natural and adoptive parents in the State of Michigan are unrestricted and unconditional as stated at MCLA 722.31.

The Court will note particularly the distinctions between Public Law 480 and the policies promulgated by the defendant, and the obligations therein, and the laws of general applicability.

First, the step-parent is only obliged to contribute to the support if he is living in the same household with the child. The parental obligation follows a parent and is eternal.

Second, the step-parent is only obliged to support a child who otherwise eligible to receive relief under the program here in question.

Third, the step-parent, unlike a parent, must support its step-child in the manner approved by the County [7] Welfare Department and in a manner enforceable only by the Welfare Department.

All three differ from the obligations of natural or adoptive parents and all three aspects demonstrate that the Michigan support obligation, this statute and policy, are not even generally applicable to all step-parents.

And it is noteworthy further, that the obligation of Michigan AFDC step-parents will terminate by its terms —by the terms of the statute, in 1982.

The policy then, and the statute, and the actions taken pursuant thereto directed at plaintiffs in this lawsuit, are unlawful under federal law.

The irreparable harm to be suffered by plaintiff has been demonstrated first in the affidavit and statements of potential lost medical benefits which are only obtainable under the program, from which these children may be severed pursuant to the unlawful policy.

The Court is further advised that recent Court decisions following the Eleventh Amendment of the United

States Constitution, have made it apparent that there is no remedy at law for persons in plaintiffs' situation, in as much as the Court cannot later award retroactive benefits to the group here in question.

The Court further takes note of and gives its [8] attention to the affidavit of the plaintiffs who have made it apparent that a person living on these benefits is very close to the edge of survival, economic survival, at all, and that the loss is an irreparable loss when they are cut off from the program.

The public policy that this Court is to follow has been set out by our legislative body, and this Court notes that in this country that legislative body is the Congress. The United States Congress. And the Department of Health, Education and Welfare has promulgated regulations pursuant to Congress. It is not the policy of this country to draw step-parents into a welfare-specific obligation.

Defendant has mentioned the converse. The harm that will be suffered, the balance of harm that this Court should consider: Harm suffered by other beneficiaries of the Welfare program or the other recipients in the State of Michigan, if the Court were to enjoin actions taken here.

The Court realizes this is a very unfortunate situation. However, legislators and administrators and administrative officials advising our legislators, act at their peril when, in the face of clear federal regulations, case law and statutory law, they proceed to take actions which deprive a group of people, a clear group, of their Federal Rights.

So, the order will enter when presented.

* * * *

[Certificate of Reporter Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

STIPULATION TO AMEND ORDER GRANTING PRELIMINARY INJUNCTION

The parties, by and through their respective counsel, hereby agree and stipulate as follows:

1. The June 26, 1981 preliminary injunctive order was based upon this Court's finding that defendant's policy of assuming the availability of income from a stepparent for purposes of calculating AFDC and Medicaid benefits appeared to be contrary to existing federal law.

2. That on August 13, 1981, President Reagan signed into law the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, copy attached as Exhibit "A", Section 2306(a) of which amends the Social Security Act, 42 USC § 602(a), effective October 1, 1981, to provide that income of stepparents living in the same household as the child shall be counted for the purposes of determining eligibility and amount of benefits for AFDC.

3. That as of October 1, 1981, the merits of the propriety of prospective injunctive relief based on the old state policy and state statute will become moot because of the enactment of the new mandatory federal stepparent provision and for that reason the parties agree, subject to the Court's approval, to modify the June 26th

Order so that it will no longer have prospective injunctive effect from and after October 1, 1981.

Dated: Sept. 14, 1981

/s/ Robert N. Rosenberg
ROBERT N. ROSENBERG
Assistant Attorney General
512 Commerce Center
Lansing, Michigan 48913

Dated: 10/16/81

/s/ Edward Hoort
EDWARD HOORT
900 Michigan Building
220 Bagley Avenue
Detroit, Michigan 48226

Dated: 10/16/81

/s/ Edward Hoort for
WILLIAM BURNHAM
468 W. Ferry
Detroit, Michigan 48202

Dated: 10/16/81

/s/ Edward Hoort for
PAUL REINGOLD
420 N. Fourth Street, Room 800
Ann Arbor, Michigan 48104

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

ORDER AMENDING PRELIMINARY INJUNCTION

The Court having received the Stipulation of the Parties, and it appearing that the Omnibus Reconciliation Act of 1981 has amended federal law in respect to this cause;

IT IS HEREBY ORDERED that the Preliminary Injunction issued by this Court on June 29, 1981 should have no prospective effect on and after October 1, 1981.

DATE: 10/21/81

HONORABLE ANNA DIGGS TAYLOR
District Judge

Approved as to form and content

/s/ EJH as per phone conversation 10/14/81 for
ROBERT ROSENBERG
Assistant Attorney General
512 Commerce Center Building
Lansing, MI 48926
(517) 373-7700

/s/ Edward J. Hoort
EDWARD J. HOORT
Michigan Legal Services
900 Michigan Building
220 Bagley Avenue
Detroit, MI 48226
(313) 964-4130

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

MEMORANDUM OPINION AND ORDER

Before the court are plaintiffs' motions for summary judgment and class certification, and defendant's motion to dismiss. Since the facts of the case and its procedural development are important to an understanding of the court's ruling, they will be set out in some detail below.

I. FACTS

On May 11, 1981 the named plaintiffs filed suit "on behalf of themselves, their children and the class of all persons similarly situated." The class was defined as being comprised of "all persons who live in households which will have their AFDC [Aid to Families with Dependent Children] benefits terminated or reduced because of the presence of a stepparent."

The complaint challenged an amendment to Section 2 of the Michigan Poor Law, MCLA 401.2, effective January 20, 1981, and Assistance Payment (AP) Manual Bulletin 81-5 and revised AP Item 208, effective March 1, 1981. Plaintiffs challenged as violative of federal statute and constitution the new policy implemented on March 1, 1981 by the Michigan Department of Social Services (MDSS) which required that incomes of stepparents be considered in determining AFDC eligibility or grant levels for stepchildren under the age of 18 who live in the same household as the stepparent. Plaintiffs contended that the state's mandate that stepparent's income be automatically considered in computing eligibility for

and amount of AFDC benefits violated the applicable provision of the Social Security Act, 42 U.S.C. § 602(a)(7), and regulations passed under the Act. 45 C.F.R. §§ 233.90(a)(1) and 233.20(a)(3)(ii)(D).

Plaintiffs' first count asserted that the federal law required defendant to aid all "dependent children"; that in determining financial eligibility and the amount of assistance for a dependent child, defendant could only consider the net income and resources actually available to support the dependent child; that defendant could not lawfully assume the availability or resources of a stepparent when determining need or eligibility unless the stepparent was legally obligated to support the stepchild "under state law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children"; and that Michigan does not have such a law of general applicability imposing an absolute legal obligation on stepparents to support stepchildren to the same extent as is required of natural or adoptive parents.

Plaintiffs second count asserted an equal protection violation as a result of the revisions of the Michigan Poor Law, MCLA 401.2, which allegedly required stepparents to take on a greater responsibility for support of stepchildren eligible for AFDC benefits than was required of stepparents of stepchildren who were not eligible for AFDC benefits.

Count III alleged that the state policy impermissibly burdened plaintiffs' right of family privacy and free association by encouraging stepparents to move out of the home or get a divorce if they are already married, and by encouraging prospective stepparents not to get married. Plaintiffs claimed these rights were violated because the Poor Act imposed the support duty on "the stepparent of a dependent child who lives in the same household."

Plaintiffs' fourth claim alleged another violation of federal law and equal protection. Plaintiffs contended

that defendant's regular policies permitted dependent children and their caretaker relatives to deduct from gross earned income all actual expenses of producing that income; plaintiffs further asserted that the defendant permitted an earned income disregard for persons qualified to receive one. Plaintiffs contended that defendant's policy applied unequally to stepparents because it did not permit the stepparent any work expense deductions or earned income disregards. Rather, 80% of the gross earnings of a stepparent was automatically counted as available income. Plaintiffs asserted that this distinction between the incomes of stepparents and other caretaker relatives violated the Act and equal protection guarantees.

Plaintiffs sought class certification; a declaratory judgment that defendant's policies and practices violated federal statutory and constitutional provisions; injunctive relief to enjoin defendant from continuing to enforce its practice; notification to all class members of their rights to an administrative review under state procedures, and; attorney's fees.

On May 28, 1981 plaintiffs filed a motion for a preliminary injunction. The motion was filed before the predecessor judge. Plaintiffs sought to enjoin, pending trial, defendant from continuing its complained of policy regarding stepparents' incomes. The motion was argued on June 16, 1981 and granted that day in a bench opinion. On June 29, 1981 a written order was issued. In pertinent part the order granting a preliminary injunction stated:

> Plaintiffs have shown a strong or substantial likli-hood of success on the merits inasmuch as it appears that Public Act 480 of 1980, MCLA 401.2 and the Defendant's policy as found in Assistance Payments Manual Item 208, require the assumption of income from a stepparent for the purpose of calculating Aid to Families with Dependent Children (AFDC) benefits and it appears that presuming income to be

available for such purpose is violative of 42 U.S.C. § 602(a)(7) and the regulations promulgated thereunder, 45 C.F.R. 233.90(a)(1) because Public Act 480 of 1980, MCLA 401.2 is not a law of general applicability which legally obligates stepparents to support their spouse's children to the same extent that natural and adoptive parents are obligated to support their natural and adoptive children.

IT IS HEREBY ORDERED that, pending the final resolution of this case on its merits or until further order of the Court, the Defendant is preliminarily enjoined from assuming the availability of stepparent's income for the purpose of calculating AFDC benefits pursuant to Assistance Payments Manual Item 208.

IT IS FURTHER ORDERED that Defendant be and is hereby preliminarily enjoined from terminating, reducing, or denying AFDC or Medicaid benefits by reason of the assumption of the availability of stepparent's income to applicants or recipients of such benefits from and after the effective date of this order.

IT IS FINALLY ORDERED that Defendant, beginning in and for the month in which this order takes effect shall take the following actions:

(A) Reinstate all AFDC and Medicaid cases heretofore terminated because of the above enjoined policy;

(B) Raise all AFDC and Medicaid grants reduced because of the enjoined policy to their appropriate levels, and

(C) Re-evaluate the eligibility of AFDC and Medicaid applicants who were denied benefits solely by reason of the Defendant's use of Assistance Payments Manual Item 208 as modified because of the passage of 1980 PA 480.

By its own terms the order became effective June 1, 1981.

On July 1, 1981, defendant appealed the order granting a preliminary injunction to the Court of Appeals for the Sixth Circuit. Requests for stay of the order were made to both the trial and appellate courts but were denied.

On August 13, 1981 the President signed into law the Omnibus Budget Reconciliation Act of 1981, Pub.L.No. 97-35, which amended the Social Security Act, 42 U.S.C. § 602(a), effective October 1, 1981, to provide that income of stepparents living in the same household as the child shall be counted for the purposes of determining eligibility and amount of benefits for AFDC. As a result of this change in the law, the parties stipulated to amend the preliminary injunctive order, making its prospective effect valid only up to October 1, 1981. On October 21, 1981, the court entered an order amending the order granting the preliminary injunction to comport with the parties' stipulation. On October 27, 1981 the defendant's appeal was voluntarily dismissed.

The parties' motions now before the court bring to issue a concern for the narrow, discrete period of time between March 1, 1981 through June 1, 1981. March 1, 1981 was the effective date of the defendant's complained of policies. On June 1, 1981 the predecessor judge's preliminary injunction took effect, prohibiting defendant from continuing its policies. The injunction protected plaintiffs from June 1, 1981 through October 1, 1981. Both sides agree that after October 1, 1981 an amendment to the federal law upon which plaintiffs based their lawsuit ended all potential for plaintiffs' further prospective relief.

II. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS

Plaintiffs' motion for summary judgment seeks to have this court decide the same issue that was preliminarily

decided in their favor by the predecessor judge on their motion for a preliminary injunction. The legal arguments now presented by plaintiffs are substantially the same as these presented in their earlier motion. The difference is that now plaintiffs seek a declaration from this court that the past policies of defendant violated the law as it existed during March, April, and May of 1981.

The starting point for plaintiffs' motion is the then applicable section of the Social Security Act which plaintiffs assert defendant violated. Before its amendment section, 42 U.S.C. § 602(a)(7) provided:

> [T]he State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child or relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

Plaintiffs contend that the regulations promulgated under this section by the Department of Health and Human Services (HHS) and the cases that have interpreted this section require that before a state can deem the income of a stepparent available to the stepchild there must be a state created general, unqualified obligation on stepparents to support their stepchild to the same degree as is imposed on natural or adoptive parents.

The then applicable federal regulation upon which plaintiffs rely, 45 C.F.R. § 233.90(a)(1), provided:

> The determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, *will be made only in relation to the child's natural or adoptive parent, or in relation to the child's nat-*

ural or adoptive parent and is legally obligated to support the child under State law or general applicability which requires stepparents to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State, nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household.

In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

(Emphasis added).

The amendment to the Michigan Poor Law, the basis for defendant's complained of change in policy, provided:

> The husband or wife of a poor person being of sufficient ability, shall relieve, maintain, and support the poor person, and the father and mother of a dependent child, *and the stepparent of a dependent child who lives in the same household as the dependent child,* being of sufficient ability, shall jointly or severally relieve, maintain and support the dependent child, in the manner * * * approved by the county department of social services of the county in which the poor person is settled or is living. (Em-

phasis added, reflecting amendment effective January 20, 1981).

MCLA 401.2. Based on this change in state law by the Michigan Legislature, defendant changed its policies effective March 1, 1981, as reflected in Assistance Payments (AP) Manual Bulletin 81-5 and AP Item 208.

Defendant's new policies created a uniform method of determining who was a "responsible and dependent relative" and of determining the amount of income from the "responsible relative" that would be considered as available in determining the eligibility and need. The AP Manual Bulletin stated in pertinent part:

> A major simplification is in the area of the treatment of earned income. In the responsible and dependent relative processes, 80% of the responsible and dependent realtive's gross earnings are used to establish a net income amount. The 80% process incorporates all taxes and expenses and no separate calculation of these deductions is required to net income.

The relevant provision of AP Item 208 provided:

> DEPARTMENT POLICY:
>
> A responsible relative, if financially able, is required to contribute to the support of his dependent relative who is a member of an ADC group. ADC group income may be diverted to a dependent relative of an ADC group member.
>
> A responsible relative is a person's spouse or the legal parent of an unemancipated minor child. The stepparent of an unemancipated minor child is the child's responsible relative while the stepparent and child live together.
>
> A dependent relative is a person's spouse or a person's unemancipated minor child. A person's unemancipated minor stepchild is a dependent relative when the stepparent and stepchild live together.

Plaintiffs contend that the amendment to Michigan's Poor Law did not create a legal obligation of general applicability upon stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Therefore, plaintiffs argue that defendant's change in policy violated the preamendment Social Security Act and the HHS regulations promulgated thereunder. Plaintiffs distinguish the stepparents' support obligation created by the Michigan Poor Law from the unrestricted and unconditional obligation of support Michigan places on natural or adoptive parents. As provided in MCLA 722.3:

> The parents are jointly and severally obligated to support a minor unless a court of competent jurisdiction modifies or terminates the obligation; or the minor is emancipated by operation of law except as otherwise ordered by a court of competent jurisdiction.

In MCLA 722.1 parents are defined as "natural parents, if married prior or subsequent to the minor's birth; adopting parents, if the minor has been legally adopted; or the mother, if the minor is illegitimate." Plaintiffs argue that this language differs greatly from the conditional stepparents' support obligation in the Poor Act. *See also* MCLA 722.3(2).

The plaintiffs rely upon HHS responses to other states' policies on stepparent support obligations and on case law construction of the preamended Social Security Act to support their assertion that they are entitled to the relief they seek. The court does not need to scrutinize plaintiffs' case analysis because the defendant's arguments raised in its motion to dismiss are dispositive.

Defendant's motion to dismiss argues that as a result of the amendment to the Social Security Act plaintiffs' claims are moot and the court is without jurisdiction to award any relief. Defendant contends that the change in federal law coupled with the Eleventh Amendment pro-

hibition against awarding retrospective relief against a state requires dismissal of the case against them.

Since its passage, the Eleventh Amendment has been applied by courts to hold unconsenting states immune from the suits brought in federal courts by citizens. Evolution of the rule has led courts to bar lawsuits by private parties where the liability sought to be established would lead to a pay out from the public treasury. *Edelman v. Jordan*, 415 U.S. 651 (1974).

In a narrow, circumscribed yet important modification of prior Eleventh Amendment analysis, the Supreme Court in Ex Parte Young, 209 U.S. 123 (1908), held that the Eleventh Amendment did not bar prospective injunctive relief. In subsequent cases, the Court sanctioned prospective relief even where such relief had an ancillary effect on the state treasury. *See Graham v. Richardson*, 403 U.S. 365 (1971) and *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, in each instance the monetary impact upon the state was merely incidental to prospective relief.

In contrast to *Ex Parte Young* and its progeny, plaintiffs here seek to have the court award relief which is purely retrospective in nature and which is not incidental or ancillary to any prospective relief. Plaintiffs ask the court to grant them something which they are barred from recovering under the Eleventh Amendment. While plaintiffs couch their request for relief in terms of *Quern* type notice relief, the court finds that the request is not ancillary to any valid, awardable prospective relief.

The court finds that since this case involves only retrospecitve relief, it differs materially from *Quern*, the primary case urged upon the court by plaintiffs as support for their argument that defendant should be required to provide notice to a class regarding its past illegal conduct. In *Quern* the Court was called upon to answer questions left open in their remand of *Edelman v. Jordan*, 415 U.S. 651 (1974). The *Quern* Court upheld the Court of Ap-

peals for the Seventh Circuit's modification of the district court's order requiring notification to class members concerning Illinois' illegal untimely processing of disability claims. However, the critical distinction between the plaintiffs in *Edelman/Quern* and the plaintiffs here is that the *Edelman/Quern* plaintiffs had already been certified as a class and had already been successful in obtaining a permanent injunction, granting them full prospective relief. As a consequence, the notice approved of by the Court in *Quern* was viewed as ancillary to the prospective relief already granted.

In stark contrast, the present plaintiffs have not succeeded in obtaining any prospective relief at all. Plaintiffs seek to have the court make a declaratory ruling in their favor concerning past conduct, certify a class, and require defendant to send a *Quern* type notice to all class members. The court finds that plaintiffs have not obtained and could not obtain any prospective relief upon which to base an ancillary order requiring *Quern* type notice.

An examination of the well reasoned, relevant trial and appellate cases that have interpreted the impact of *Ex Parte Young* on the Eleventh Amendment and an application of the Supreme Court cases that have undertaken such an analysis dictate that before this court can award plaintiffs what they seek there must be an award of prospective relief in their favor. Because the Eleventh Amendment forecloses the plaintiffs from an award of money damages as retrospective relief and because by their own admission they are not entitled to prospective relief, the court finds it is precluded from taking the steps sought by plaintiff to impose monetary retrospective relief. *Quern v. Jordan*, 440 U.S. 332 (1979).

Accordingly, defendant's motion to dismiss is granted and plaintiffs' motion for summary judgment is denied. The Eleventh Amendment and the mootness of this case mandate the court's ruling.

In view of the court's ruling on defendant's motion to dismiss, and plaintiffs' motion for summary judgment, the plaintiffs' motion for class certification is moot and, therefore, is denied.

/s/ Charles W. Joiner
CHARLES W. JOINER
United States District Judge

Dated: June 22, 1982
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

JUDGMENT

The plaintiffs' motions for summary judgment and class certification, and defendant's motion to dismiss came on for hearing before the court, Honorable Charles W. Joiner presiding, and the issues having been duly heard and a decision having been duly rendered in a Memorandum Opinion and Order dated June 22, 1982.

It is Ordered and Adjudged that the plaintiffs take nothing, and that the action be dismissed on the merits, with prejudice.

ROBERT A. MOSSING

/s/ Sharon M. Burley
Clerk of Court

/s/ Charles W. Joiner

Dated: June 22, 1982
Ann Arbor, Michigan

II. THE CHILD CARE CASE— MWRO v. DEMPSEY

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

Civil No. 80-60017

MICHIGAN WELFARE RIGHTS ORGANIZATION

v.

JOHN T. DEMPSEY

RELEVANT DOCKET ENTRIES

Date	Proceedings
1980	
Apr. 11	Complaint filed, summons issued.
May 6.	Plfts' motion for class certification, with brief.
May 9.	Plft's notice of hearing on 6-3-80 at 2:00 p.m.
May 12.	Order, re: the motion (#3) filed in the above-entitled cause will be denied unless the movant files, within 5 days of the date of this order, a proof of service as required by local court rule IX(i) & a notice of hearing as required by local court rule IX(j), with pfoor of service. DeMascio, J.
May 28.	Deft's brief in opposition to motion for class certification, with attachment & proof of service.
June 3.	Deft's answer, with affirmative defenses, proof of service & exhibits.

Date	Proceedings
June 4.	Plfts' supplemental brief in support of class certification.
(out of order)	
June 3.	Plft's motion for class certification heard & taken under advisement.
July 22	Supplemental affidavit of John T. Dempsey with attachment
July 25.	Plfts' 2nd supplemental brief in support of motion for class certification, with proof of service.
Sept 8.	Deft's supplemental brief in opposition to motion for class certification, with attachments & proof of service.
1981	
Jan 23.	Memorandum & order, re: that Plfts' motion for class certification be & the same is hereby denied. DeMascio, J
Jan 9.	Plfts' first set of interrogatories & request to admit, with exhibits & proof of service.
Jan 27	Notice of pretrial conference set for 2/25/81 @ 4:30.
Feb 3.	Deft's motion to dismiss, with brief & proof of service.
Feb 13.	John Green's motion to intervene, with exhibits, brief, proof of service & proposed intervenor complaint for declaratory injunction & other releif.
	Deft's response to plfts' request to admit, with proof of service.
Mar 4.	Plft's response, with affidavit, & brief.
Mar 10	Brief in opposition to motion to intervene with attachments
Mar 26.	Plfts' points & authorities in response to deft's brief in opposition to intervention.

Date	Proceedings
Mar 30.	Deft's motion to dismiss, denied & motion to intervene as pltf is granted.
Apr 10.	Order granting intervention, re: of Johnny Green. DeMascio, J
Apr 15.	Order denying dismissal, re: counts I & III of plfts' complaint are dismissed as to Gail Blessing only, as they are moot. & as to all other respects, defts' motion to dismiss is denied. DeMascio, J
Apr 24.	Plft's request for production of documents,
May 6	Defendant Dempsey response to request for production of documents
1982	
Jan 7	NOTICE of trial for Feb. 1/82 at 9am.
Jan 29	ORDER OF REASSIGNMENT TO ANN ARBOR. DD 1/4/82. Feikens, J.
Feb 9	Plfts motion for summary judgment w/brief & attachments.
	Deft. Dempsey's Motion to Dismiss, BA with Ex. A-H, PS (no notice of hearing)
Feb 4	Deft's Answers to Pltfs' First Set of Interrs. and PS
Feb 9	Pltfs' MOTION for Class Action, BA. No Notice of Hearing.
	Pltfs' Brief in Opposition to MOTION to Dismiss, with attachments.
Feb 1	Deft's Brief in Opposition to Plts' MOTION for Summary Judgment, with PS.
Feb 17	NOTICE of hearing on Pltf's Motion for Class Certification and Motion for SJ set for 3/9/82 at 2:30 PM and PS
Feb 17	John T. Dempsey's ANSWER to Intervenor Complaint and PS

Date	Proceedings
Feb 19	John T. Dempsey's AMENDED NOTICE of hearing on Motion to Dismiss previously set for 2/16/82 reset for 3/9/82 at 2:30 PM and Proof of Service
Mar. 8	Pltfs'. Supplemental Memorandum in Opposition to MOTION to Dismiss & in Support of MOTION for Summary Judgment, with attachments.
Mar. 8	Trial set for today adj. to 3/15/82 by court.
Mar. 9	MOTION to Certify Class & Cross MOTIONS SJ hrd/ TAKEN UNDER ADVISEMENT.
Mar. 16	Pltfs' Supplemental Memo in Opposition to Dismissal & in Support of SJ, & PS.
	Entered in error (See 79-60017 # 62.)
Apr. 19	Pltfs' Attachments to pltfs' Briefs in support of their MOTION for SJ and MOTION for Class Certification.
Jun 23.	MEMORANDUM Opinion and order Denying Pltf's Motion for summary Judgment and Granting Deft's Motion to dismiss Joiner, Motion for Class Certification is Moot.
Jun 23.	JUDGMENT that pltfs take nothing and that the action be dismissed prejudice.
July 22	Pltfs' Notice of Appeal from final judgment entered on 6/22/82. DD 7/23/82

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 80-71479

MICHIGAN WELFARE RIGHTS ORGANIZATION, on behalf of its members, and GAIL BLESSING, individually, and both plaintiffs on behalf of all others similarly situated,
PLAINTIFFS

vs.

JOHN T. DEMPSEY, individually and in his official capacity as Director, Michigan Department of Social Services,
DEFENDANT

COMPLAINT FOR DECLARATORY INJUNCTIVE AND OTHER RELIEF

I.

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief to redress the Defendant's failure to administer Michigan's Aid to Families with Dependent Children Program (ADC or AFDC) consistently with the applicable federal statutes and regulations and the Fourteenth Amendment to the United States Constitution. More specifically, Plaintiffs allege that the Defendant has failed to allow ADC applicants and recipients to deduct actual costs of child care and other actual expenses of employment from their earned income in determining grant eligibility as required by § 402(a)(7) of the Social Security Act and regulations under the Act, and has failed to give said applicants and recipients adequate notice of

their rights and remedies as required by the federal regulations and the Due Process clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs further allege that the Defendant's failure to allow child care costs to be deducted while allowing other actual expenses of employment to be deducted drawn directly among recipients without any rational basis in violation of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

2. Plaintiffs bring this suit to request injunctive and declaratory relief on behalf of themselves and all persons throughout the State of Michigan who are, have been, or will in the future be adversely affected by the Defendant's policies and practices.

II.

JURISDICTION

3. Plaintiffs' action for declaratory, injunctive and relief are authorized by:

(a) 28 USC §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments;

(b) 42 USC § 1983, which provides for redress of any deprivation, under color of state law, of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

4. Jurisdiction is conferred upon this Court by 28 USC § 1343(3), the pendent jurisdiction doctrine and 28 USC § 1331. The amount in controversy, exclusive of interest and costs exceeds $10,000.00.

III.

CLASS ACTION

5. The individual named Plaintiffs bring this action on their own behalf and, pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The members of the class similarly situated to the named Plaintiffs are all applicants for and recipients of ADC in Michigan, who have unsuccessfully claimed or will claim, or who have not been or will not be adequately informed of their right to claim, excess child care costs and other reasonable actual expenses incurred in connection with their employment, and who consequently have had their eligibility or level of benefits determined without regard to such actual expenses of employment.

6. The requirements of Rule 23 are met in that: the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of all class members; the claims of the representative parties will fairly and adequately protect the interests of the class; and the party opposing the class has acted on grounds generally applicable to the class, i.e., failing to consider all reasonable costs as actual expenses of employment, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

IV.

PLAINTIFFS

7. The individual named Plaintiff is a current recipient of benefits under the ADC Program, who has requested that the cost of child care necessitated by her employment be deducted from her earned income as an "actual expense of employment" in the determination of the amount of her ADC grant and whose request has been denied.

8. The Michigan Welfare Rights Organization, located at 2701 W. Chicago Blvd. in Detroit, Michigan, Wayne County, is a state-wide unincorporated association of Michigan recipients of public assistance, a majority of whose members receive ADC assistance and Food Stamps, and was formed to enable them to learn of their rights and entitlements, to provide concrete help and assistance to its members and to other recipients throughout the State on individual or common problems, to educate the public and those officials directly affecting or implementing welfare policy of the problems of welfare recipients, and to take action through various means including litigation to improve social welfare programs and to protect the rights of its members and all other poor persons seeking or obtaining benefits under those programs.

9. Some individual members of the Michigan Welfare Rights Organization and some other recipients of ADC have contested Defendant's denial of the deduction of child care costs and other expenses as actual expenses of employment and have received favorable results from administrative hearing decisions. Other recipients and applicants have been told that they may not deduct child care costs and, as a consequence, have not contested Defendant's denial of such deductions.

10. On behalf of members of the class, attorneys at Legal Services of Southeastern Michigan, have requested Defendant Dempsey and his agents to comply with federal requirements regarding the deduction of all reasonable work-related expenses, but have been unable to gain any voluntary compliance with the said regulations.

V.

DEFENDANT

11. The Defendant John T. Dempsey is the Director of the Michigan Department of Social Services (the "single state agency" for Michigan under Title IV of the Social Security Act) and is responsible for development of de-

partmental policy regarding the ADC program, implementation of rules and regulations of the Department for administering the said program in accordance with the applicable rules and regulations of the Federal government under MCLA 400.10, and 42 USC § 602.

VI.

FACTUAL ALLEGATIONS

12. Defendant Dempsey must comply with the Social Security Act and applicable federal regulations thereunder promulgated by the Department of Health, Education and Welfare (HEW) in order for the Michigan Department of Social Services (the Department) to continue to receive matching federal funds.

13. The Social Security Act, in 42 USC § 602(a)(7) requires that the State Department consider "any expenses reasonably attributable to the earning" of income in determining eligibility for AFDC.

14. Regulations promulgated by HEW in 45 CFR §§ 233.20(a)(6)(iv) and (7)(i) require that "all work expenses" be deducted from earned income in determining need.

15. Regulations promulgated by HEW in 45 CFR § 206.10(a)(2)(i) and (4) require that adequate notice of an applicants' rights be given and 45 CFR § 205.10(a) requires that whenever action is taken on an ADC case, notice of hearing rights must be given.

16. The Defendant has promulgated and is responsible for enforcing certain state regulations regarding the determination of need pursuant to MCLA 400.9; MSA 16.409. Such regulations provide a standard work expense deduction of $40.00 per month for working applicants or recipients of ADC. Such regulations provide, further, in Assistance Payments Manual, Item 331, page 3, that "actual expenses [of employment] may be allowed as deductions in determining the net budgetable earned income" if those expenses are specifically attributable to

earning the income, such expenses are itemized on the family's current Budget Sheet, the amounts can be verified by receipts and are reported monthly, and the amounts are for an appropriate and reasonable dollar amount for such an expense. Such regulations further provide that "[s]ince day care is provided to recipients without cost . . . it is not considered an expense of employment for applicants or recipients."

17. The sentence in Item 331, page 3, regarding the provision of day care without cost by the Department refers to a program, implemented as part of Michigan's plan for social services under Title XX of the Social Security Act, 42 USC § 1397, set forth in Services Manual, Item A-416, page 2a that all employed recipients of ADC qualify for Department payment of the full cost of child care up to maximums set by the Department. These maximums, in Services Manual Item A-446, p. 3, are: $4.16 for a full day and $2.08 for a half-day of in-home care; ($.51 per hour); $5.24 for a full day and $3.24 for a half day in a certified day care home ($.66 and $.65 per hour respectively); and $7.88 for a full day and $4.88 for a half-day in a licensed day care center ($.99 and $.98 per hour).

18. Many working applicants for and recipients of ADC are unable to obtain child care at a cost within the maximums set by the Department.

19. Many applicants for and recipients of ADC have not been informed that they can deduct excess child care costs as an actual expense of employment or have requested, but have been denied such deduction, and have not been informed of their right to a hearing on that matter.

(a) *NAMED PLAINTIFF*

As to Gail Blessing, Plaintiffs allege the following:

20. She resides in a small town in Washtenaw County, Michigan and is a citizen of the United States and a resident of the judicial district.

21. At all times pertinent hereto, she is and was a recipient of ADC (case number K81158818A) through the Washtenaw County Department of Social Services on behalf of herself and her two children because of the continued absence from the home of the children's father.

22. On August 13, 1979, Ms. Blessing began working in nearby Ann Arbor, Michigan being paid at a rate of $4.00 per hour for approximately 40 hours per week. She has continued to work up to the present time.

23. Ms. Blessing's employer's place of business in Ann Arbor is 14.3 miles from Ms. Blessing's home and she must drive her car 28.6 miles each day round trip, to get to work and back home because convenient public transportation is not available.

24. Because of her job, Ms. Blessing has had to make arrangements for care of her children while she is at work. Approximately 55 hours of day care is necessary for her children each week.

25. The maximum rate which the Defendant will pay for licensed day care for both children is $8.48 per day. Though she has tried, Ms. Blessing has been unable to find suitable day care at a cost within this limit. The cheapest suitable day care arrangement which she has been able to procure costs $1.00 per child per hour for an average cost of $11.50 per day. This means that Ms. Blessing must pay approximately $15.10 per week for day care above the $42.40 provided by the Department.

26. When she began work, Ms. Blessing became obligated to fill out and return certain of the Department's monthly reporting forms providing detailed information relevant to her earned income, including information regarding work expenses. Because she was not told by any Department employee that she could claim child care costs or mileage as work-related expenses, or how to do so, and because the Monthly Income Report form stated that she would have to attach receipts for all expenses claimed, Ms. Blessing did not claim actual work expenses for her first months of employment. She was, therefore,

credited with only the standard $40 per month work expense deduction by the Department.

27. In February, 1980, Ms. Blessing went to the office of Legal Services of Southeastern Michigan about her divorce and, in the process of discussing her family's situation with a paralegal worker in that office, was told that she should claim mileage, day care costs and any other actual expenses which she had incurred as a result of her job.

28. When Ms. Blessing called her caseworker to inquire about actual expenses deductions, she was told that mileage would be allowed at 18.5 cents per mile, but that day care charges which she had been paying could not be allowed as deductions. She was not informed by her caseworker that she could request a hearing if she was dissatisfied with the determination.

29. She nonetheless filled out her earned income reporting form on February 1, 1980 claiming the day care expenses as well as the cost of gasoline for her car and $218.45 for repairs to the car made necessary when it broke down on the way to work one day. A copy of the said form is filled out by Ms. Blessing is attached as Plaintiff's Exhibit A and by this reference incorporated herein. Ms. Blessing has continued to claim and be denied actual expenses of child care each month since February 1, 1980.

30. On March 3, 1980, Ms. Blessing filed a hearing request contesting the Department's failures to inform her as to what work expenses would be allowed and requesting that she be allowed deductions for commuting, car repairs and insurance, and day care charges in excess of the amount paid by the Department. A copy of her hearing request is attached as Plaintiff's Exhibit B and by this reference incorporated herein.

31. At a pre-hearing conference held on March 17, 1980 with her caseworker and the Intake Supervisor, Ms. Blessing was told that, as a result of her earned income report of February 1, 1980, the Department had allowed

her to deduct the car repair costs of $218.45, but it had later determined that deduction to be improper. She was also told that her claim for commuting expenses would be allowed for 28.6 miles per day at the flat rate of 18.5 cents per mile. However, she was informed that her claim for day care expenses in excess of the amount paid by the Department would not be allowed because of the prohibition against allowing any day care expense deductions set forth in Item 331, page 3, of the Assistance Payments Manual. A copy of the Hearing Summary setting forth the Department's position is attached as Plaintiffs' Exhibit C and by this reference incorporated herein.

(b) *ORGANIZATIONAL PLAINTIFF*

32. Michigan Welfare Rights Organization has received numerous complaints from its members and others regarding the Defendant's refusal to deduct actual child care costs as an expense of employment.

33. A number of other applicants for and recipients of ADC have complained of the Department's failure to allow excess child care costs as deductions from earned income. On their behalf, attorneys from the office of Legal Services of Southeastern Michigan initiated a correspondence with Defendant and with Paul E. Webb, Regional Commissioner of the Department of Health, Education and Welfare, requesting that Item 331 of the AP Manual be changed. Mr. Webb, in a letter dated May 9, 1978, advised Defendant Dempsey that "if the amount [of child care allowance] under your service plan does not meet the actual cost of child care, it will be necessary to revise your Title IV-A plan to assure that all actual reasonable expenses of employment are considered." A copy of that letter is attached as Plaintiffs' Exhibit D and by this reference incorporated herein. A subsequent letter from Mr. Webb, dated October 10, 1978, again refers to the illegality of the prohibition

on deducting child care expenses in Item 331 stating: "If AFDC applicants and recipients are being required to pay excess child care costs, please advise us what corrective actions you intend to take to obtain compliance with Section 402(a)(7) of the Social Security Act". A copy of that letter is attached as Plaintiff's Exhibit E and by this reference incorporated herein. Despite being apprised of the Item's illegality, Defendant has failed to change the policy and has offered no reasonable explanation for failing to doing so. As a consequence a great number of applicants and recipients are daily being denied the benefits which Congress has clearly intended that they be provided.

34. A number of applicants and recipients who have inquired regarding deductions have been told that, under Item 331, page 3, they cannot claim excess child care costs and other expenses as expenses of employment and have not been adequately informed of their right to a hearing on the matter. A few have requested a hearing anyway and have been awarded the deduction despite the prohibition in Item 331. Others have read the notice in their monthly income reporting form that they must attach receipts for all work expenses as precluding any claim for expenses such as mileage.

35. Plaintiff Michigan Welfare Rights Organization believes and therefore alleges that many ADC recipients and applicants, including its own members, have suffered and will continue to suffer in the future as a result of Defendant's failures to comply with 42 USC § 602(a)(7), 45 CFR §§ 233.20(a)(6)(iv) and (7)(i) and 45 CFR §§ 206.10(a)(2)(i) and (4).

VII.

FIRST CLAIM FOR RELIEF

36. The failures of the Defendant Dempsey, as set forth above, to allow Plaintiffs and their class to claim actual costs of child care and other expenses of employ-

ment when they exceed the standard $40 per month work expense allowance violates the requirements of § 402(a)(7) of the Social Security Act, 42 USC §602(a)(7), and the regulations thereunder, 45 CFR §§ 233.20(a)(6)(iv) and (a)(7)(i) and therefore contravene the Supremacy Clause of the United States Constitution.

VIII.

SECOND CLAIM FOR RELIEF

37. The failures of the Defendant Dempsey, as set forth above, to require that applicants for and recipients of ADC be clearly informed of their right to claim actual work expenses which exceed the standard amount, including child care costs in excess of the Department of Social Services subsidy and mileage, and of their right to request an administrative hearing to contest Defendant's employees' refusals and failures to include as work expense deductions all actual expenses incurred in connection with employment, including child care costs in excess of the subsidy provided and mileage, violate the rights of Plaintiffs and their class under 45 CFR § 206.10(a)(2)(i) and (a)(4), 45 CFR § 205.10(a)(3), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

IX.

THIRD CLAIM FOR RELIEF

38. The Defendant, by promulgating and carrying out the provisions of AP Manual Item 331, allows some actual work expenses to be deducted, but disallows child care expenses in excess of the maximum subsidy paid by the Department. In light of the purposes of the ADC program, no rational basis exists for allowing some actual expenses of employment but not allowing others. Consequently, the distinction drawn in Item 331 violates

the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

X.

EQUITY

39. Plaintiffs and the class they represent, have no plain adequate or complete remedy at law to redress the above stated deprivations of their federal and state constitutional, statutory, and regulatory rights, and are suffering and will continue to suffer irreparable harm therefrom unless relief sought herein is granted by this Court.

RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray that this Court:

(a) Assume jurisdiction of this cause pursuant to 28 USC §§ 1343 and 1331;

(b) Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action may be maintained as a class action;

(c) Enter a final judgment, declaring that the Defendant Dempsey's action in denying full deduction of all actual expenses, including child care costs, as expenses of employment, violates the Social Security Act, 42 USC § 601 *et seq.*, the regulations thereunder; and the Equal Protection Clause;

(d) Enter a final judgment declaring that the Defendant's action in failing to give adequate notice of recipients an applicants rights with respect to the deduction of actual employment-related expenses and of their rights to a hearing, violates the Social Security Act, 42 USC § 601 *et seq.*, the regulations thereunder, and the Due Process clause;

(e) Enter preliminary and permanent Injunctions enjoining the Defendant, his officers, agents, employees and persons in active concert or participation with him from

denying all reasonable expenses, including excess child care costs, as actual expenses of employment, and from failing to inform applicants and recipients of their rights to deduct such expenses and to obtain an administrative hearing.

(f) Allow Plaintiffs their costs herein plus reasonable attorneys fees, and grant them and all persons similarly situated such additional or alternative relief as may seem to this Court to be just and equitable.

DATED: April 11, 1980

/s/ William Burnham
WILLIAM BURNHAM
Attorney for Plaintiff
Ann Arbor, MI 48104

/s/ Edward Hoort
EDWARD HOORT
Attorney for Plaintiff
Detroit, MI 48226

JAN 1-31 1980

MONTHLY INCOME REPORT

FEB -4 1980

Michigan Department of Social Services

K 911585 81	ADC Eligibility No. 3 2	Co. Co. 81	ADC Worker's Name DOLLAR HIDE

Client's Name: GAIL BLESSING

Address (Number and Street): 94 W. MAIN

City, State, ZIP Code: MILAN, MI. 48160

County Return Address: WASH. CO.

INSTRUCTIONS: This income report is needed to determine your grant amount. Fill in this form completely on the last day of the month shown above. Sign and mail to your County Department of Social Services Office in the enclosed stamped envelope. If you do not report your income to the County Department of Social Services Office by the 5th (FIFTH) of the month after the month shown above, we will be unable to determine your eligibility for assistance, and your payments may stop. Be sure to answer each question and sign the form.

INCOME TO REPORT: If you earned, received or stopped receiving income or had a change in other income during the report month, list all income and report below. Income includes EARNINGS (salary, wages, tips, commissions and bonuses); free housing or utilities; UNEMPLOYMENT INSURANCE/DISABILITY INSURANCE, workmens compensation, strike benefits, training allowances or incentive payments; SOCIAL SECURITY/RAILROAD RETIREMENT, supplemental security income (SSI), pensions, business, farm, rental; CHILD SUPPORT, or other contributions paid directly to a family member; MILITARY BENEFITS, settlements, tax refunds, and any other money you receive. DO NOT REPORT YOUR ADC, MEDICAL ASSISTANCE, GENERAL ASSISTANCE, OR FOOD STAMP BENEFITS.

WHO RECEIVED INCOME, MONEY, OR BENEFITS	SOURCE OF INCOME, MONEY, OR BENEFITS (If earnings, list employer and employer's address)	HOURS WORKED	DATE(S) RECEIVED	GROSS AMOUNT (Before deductions)
Gail Blessing	✓ Emmet Corp 2501 S. Industrial Av Ann Arbor	80.25	✓ 1-11-80	✓ 320.80
" "	" "	87.50	1-25-80	352.40

YOU MUST SEND ALL PAY STUBS FOR EARNED INCOME OR VERIFICATION OF CHANGES IN OTHER INCOME WITH THIS FORM. IF YOU DO NOT KNOW WHAT VERIFICATION YOU MUST SEND, CONTACT YOUR ADC WORKER.

WORK EXPENSES: Complete for earned income only.

If you had earned income from employment (whether as an employee or from self-employment) you are entitled to a $40 deduction for your normal work related expenses each month. When your expenses are greater than $40 you may choose to claim the actual expenses by listing your work related expenses below. If actual expenses are claimed, YOU MUST ATTACH RECEIPTS.

IF YOU WISH TO CLAIM ACTUAL EXPENSES, complete the report below:

Person Claiming Expenses	Days Worked	Hours Worked	TRANSPORTATION EXPENSES (Actual receipts) Method Used (car, bus, etc.)	Days using this method	Daily cost round trip	Daily miles round trip	OTHER WORK EXPENSES — Required work uniforms, or tools, licenses, membership, insurance or union dues, etc. (Attach receipts) Items	Amount
Gail	21	117.70	Car	21	.28	21 4/10	Baby sitting expenses (See receipts)	93.28
							Car repairs (See receipts)	218.74

INCOME FROM SELF-EMPLOYMENT: If you were self-employed, attach a separate sheet of paper, if needed, listing and explaining gross operating expenses. (Attach receipts for business expenses claimed.)

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT.

Client's Signature: Gail Blessing Date Signed: FEB 1, 80

DSS-[illegible] (Rev. 7-79) (This form is designed to work with County Computer DSS-[illegible] and DSS-[illegible])

Plaintiff's Exhibit A
Page 1 of 1
(Receipts attached by plaintiff omitted)

BEST AVAILA

REQUEST FOR HEARING
Michigan Department of Social Services

INSTRUCTION: Complete all items below. (Please type or print.) Send completed form in envelope provided or, mail to:

Department of Social Services
Bureau of Administrative Hearings
P.O. Box 30041
Lansing, Michigan 48909

Case Name: Gail Blessing
Case Number: X0115018 A
Date: 3/3/80
County: | District: | Unit: 3 | Manual: 02 | Other ID (If Required):
Recipient:
Name Completing DSC-1A Received From (If Other):

This request for hearing concerns the follow (check one or more):

- [x] ADC Grant
- [ ] Medical Assistance
- [ ] Food Stamps
- [ ] Services
- [ ] Level of Nursing Care
- [ ] Licensing
- [ ] Social Assistance
- [ ] Other

I request an administrative hearing before an Administrative Law Judge regarding the decision of Washtenaw County (Name of County or State Office) Department of Social Services. Following are my reasons for requesting a hearing.

I have had work expenses in excess of the standard deduction, yet I have not been allowed to claim them. I was never told that I could claim actual work expenses instead of the standard deduction used to compute my grant. I have been employed since August 13, 1979. I drive 28.6 miles to and from work each day. My auto insurance costs $76 for six months. I had to pay $219.4[illegible] in January, 1980 to have my car repaired in order to have transportation to work. Since October 15, 1979 I have had to pay $15 per week for day care, in addition to the amount of Department of Social Services pays.

I am requesting ongoing ADC benefits and retrospective ADC benefits based on my income minus my actual work expenses for day care, mileage, auto insurance and car repair.

IMPORTANT: PLEASE ENCLOSE NOTICE YOU MAY HAVE RECEIVED WHICH CAUSED YOU TO REQUEST A HEARING.

Signature of Person Requesting Hearing: Gail Blessing
Telephone Number: 439-2073
Date: 3/3/80
Street Address or Route Number: 94 West Main Street
City, State, and Zip Code: Milan, MI 48160

TO BE COMPLETED ONLY IF AN ATTORNEY HAS AGREED TO REPRESENT YOU AT THE HEARING

Name of Attorney: William Burnham
Firm or Agency: University of Michigan
Telephone Number: (313) 665-2777
Street Address or Route Number: 420 North Fourth Avenue
City, State, and Zip Code: Clinical Law Program Ann Arbor, MI 48104

DSC-1A (Rev. 3-79) Previous editions obsolete.

Administrative Hearings

Plaintiff's Exhibit B
Page 1 of 1

BLE COPY

HEARING SUMMARY
Michigan Department of Social Services
BUREAU OF ADMINISTRATIVE HEARINGS

Case Name: WILLIAMS, GAIL				
Case Number: RB1150184				Date: 3/27/80
Hearing: #1	Rehearing: #2	Date: 03	Time: 02	Other (for DHS requests)

(1) Date hearing requested: 3/3/80
(2) Effective date of action:
Budget remains as is

(3) Date client notified of Department action:
(4) Delayed pending hearing? ☐ Yes ☒ No - no negative action to delete

☐ Financial Assistance (ADC, MA, FS, GA) or Social Services Action:
1. Does claimant attend case conference: 3/14/80 ☐ Accepted ☐ Rejected
2. Date of hearing review:
3. Action(s) prompting hearing request:
☐ Termination ☐ Denial of Application ☒ Reduction ☐ Suspension ☐ Other:
4. Monthly cost: Before negative action: After negative action:

☐ Licensing Action(s):
☐ Denial ☐ Refusal to renew ☐ Revocation ☐ Modification ☐ Other:

Explanation of action taken and facts and fact sources used in taking action:

A projected budget was completed in October 1979 effective November 1979 since client reported starting work in September 1979. DHS-2C's were mailed to the client and she returned her first one dated 10/31/79. A budget was completed using the standard $40.00 deduction since no additional expenses were claimed. The DHS-2C states "when your expenses are greater that $40.00 you may choose to claim actual expenses....if actual expenses are claimed you must attach receipts." A subsequent budget was done in December using $40.00 since client did not report actual expenses either on the DHS-2C or by attaching receipts. The same action was taken when she reported her December income in January. In February when she reported her January income she declared actual expenses in excess of $200.00 which included $93.28 for babysitting and $218.74 for car repairs. Per AP Item 331, p. 3 effective 3/1/79, daycare expenses cannot be used. However, we did deduct $218.74 as an expense of employment for car repairs, which included towing, labor $106.00, and parts costing $49.50, even though the manual does not specify that this is a deduction (i.e. maintenance of an automobile) and this was an administrative error. If we had budgeted her mileage as an expense 25.6 miles per day x 21 days = 600.6 miles x 18.5/a = 111.11. She was given $107.63 more than she would normally have received. In regards to her car insurance, no verification of cost has been sent in and we feel that the cost of insurance is not necessarily work related, since she would have to pay this even if she were not working.

Law and Regulation(s) or manual item(s) used in taking action:
GA — AP Manual Item 331

Prepared by: Mary Dotter, AP Worker — Washtenaw County DHS — Date: March 17, 1980

Attach copies of papers to be used at the hearing, including medical information where in issue. If licensing action, please attach copy of licensing study report. Submit Hearing Summary in duplicate WITHIN 5 DAYS OF the hearing review to: Department of Social Services, Bureau of Administrative Hearings, P.O. Box 30041, Lansing, Michigan 48909.

DHS-[illegible] (Rev. 7-79) Previous edition may be used. DISTRIBUTION: [illegible]

Plaintiff's Exhibit C
Page 1 of 1

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PLAINTIFF'S EXHIBIT D

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

REGION V

300 South Wagner Drive
Chicago, Illinois 60000

May 9, 1978

Social Security Administration

Dr. John T. Dempsey, Director
Michigan Dept. of Social Services
Commerce Center Building
300 S. Capitol Avenue
Lansing, Michigan 48926

Dear Dr. Dempsey:

Enclosed is a copy of a letter dated April 18, 1978 from Michael Leonard, Staff Attorney, Washtenaw County Legal Aid Society, Inc. Mr. Leonard has raised question about the Michigan policy on child care allowances and employment expense deductions.

Your Title IV-A plan on employment expenses (Attachment 2.3-F, Page 2) indicates that the cost of child care is met by "Service provided or purchased by agency." We do not have a copy of the Service Manual item which establishes the amount of child care allowance paid by your agency. However, if the amount allowed under your service plan does not meet the actual cost of child care, it will be necessary to revise your Title IV-A plan to assure that all actual reasonable expenses of employment are considered.

The Supreme Court decision in Shea v. Vialpando interpreted Section 402(a)(7) of the Social Security Act as

a congressional directive that no limitation, apart from that of recommendations, may be placed upon recognition of work-related expenses, and hence a fixed work-expense allowance that does not permit deductions for expenses exceeding that standard directly contravenes the language of the statute."

Under the Supreme Court decision, a State Agency may set a standard amount for work related expenses as long as the agency also provides for all actual reasonable expenses that exceed the standard. A State Agency may not have maxima on expenses reasonably attributable to the earning of income.

Will you please send us a copy of the Service Manual item which establishes the amount of child care allowances provided by your agency. We also need to know the status of any actions you are taking to revise policy on employment expense deductions for child care.

We will appreciate receiving a response on this matter by June 8, 1978.

Sincerely,

/s/ Paul E. Webb
PAUL E. WEBB
Regional Commissioner

cc: Mr. William Dailey, Acting Director
Office of Income Assistance, MOSS

Enclosure

PLAINTIFF'S EXHIBIT E

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

October 10 1978

Dr. John T. Dempsey, Director
Michigan Department of Social Services
Commerce Center Building
300 S. Capitol Avenue
Lansing, Michigan 48926

Dear Dr. Dempsey:

Thank you for your letter of June 26, 1978, regarding alternative funding sources for child care which you are considering. It was our understanding from Ms. Kale's discussion with Mr. Townsend on August 8, 1978, that a bulletin was to be issued giving revised policy on child care as an expense of employment.

We have not received a copy of a bulletin on child care allowances. However, in reviewing the instructions contained in Manual Item 331, page 3 (revised 8/15/78 effective 9/1/78), we noted a statement on "Day Care as an Expense" which reads as follows: "Since day care is provided to recipients without cost and to non-recipients either without cost or at partial cost based on income, it is not considered an expense of employment for applicants or recipients."

We are unable to determine the exact meaning of this policy statement as it affects applicants for and recipients of AFDC. Has policy been revised to provide full cost (as a service payment) of child care for recipients of AFDC? What consideration is given to AFDC applicants who have child care costs in excess of the amounts provided under your Title XX Services Program?

In the Services Manual material sent with your letter of June 26, Title I lists the "In-Home Unit Rate Schedule" and Table II, the "Maximum Out-of-Home Care Rates." However, we noted Mr. Leonard's statement in his letter of April 18, 1978, that "many of our working ADC clients . . . pay perhaps $40.00 or $50.00 per week for day care for their child while the department presumes day care is available for $23.40 per week." Are clients required to pay amounts for child care in excess of the Department Standards as listed in the Services Manual?

We will appreciate receiving clarification of your present policies as contained in the Assistance Payments and the Services Manual with regard to child care payments for AFDC applicants and recipients. If AFDC applicants and recipients are being required to pay excess child care costs, please advise us what corrective actions you intend to take to obtain compliance with Section 602(a)(7) of the Social Security Act. We would appreciate your reply by October 27, 1978, if at all possible.

Sincerely,

PAUL E. WEBB
Regional Commissioner

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 80-71479

Hon. Robert E. DeMascio

[Title Omitted in Printing]

ANSWER

NOW COMES Defendant John T. Dempsey, by and through Frank J. Kelley, Attorney General of the State of Michigan and the undersigned assistant attorneys general, and answering Plaintiffs' Complaint for Declaratory Injunctive and other Relief says as follows:

1. Defendant is not required to respond to Plaintiffs' legal conclusions and statements of intent contained in the preliminary statement, however, to the extent any facts are stated therein they are denied.

2. Defendant is not required to respond to Plaintiffs' statement of intent relative to the scope of this lawsuit.

3(a). Defendant denies that an actual controversy exists which gives rise to a cause of action for declaratory relief under 28 U.S.C. 2201 and 2202 or Fed.R.Civ.P. Rule 57.

3(b). Defendant denies that this action is authorized by 42 U.S.C. 1983 as Plaintiffs sole non-frivolous claim is for alleged violation of the Social Security Act, not violation of civil rights cognizable under 1983.

4. Defendant denies that this Court's jurisdiction has been properly invoked under 28 U.S.C. 1343(3), pendent jurisdiction and 28 U.S.C. 1331. Defendant further denies that each Plaintiff or alleged class member has more

than $10,000 in controversy, exclusive of interest and costs.

5. Defendant denies that Plaintiffs are entitled to bring this action either on their own behalf or as a class action and in support of said denial reasserts as though set out herein the reasons included in Defendant's Brief in Opposition to Motion for Class Certification filed May 23, 1980.

6. Defendant denies that the requirements of Rule 23 have been met and in support of said denial reasserts herein the statements contained in Defendant's Brief in Opposition to Motion for Class Certification filed May 23, 1980.

7. Defendant admits the allegations contained in paragraph 7. However, although the local department office initially denied her request it was subsequently granted, after an administrative hearing.

8. Defendant lacks knowledge or information sufficient fo form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

9. Defendant admits that some individual members of Plaintiff Michigan Welfare Rights Organization (hereinafter MWRO) may be members of the alleged class however none are named Plaintiffs herein.

10. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

11. Defendant admits the allegations contained in paragraph 11.

12. Defendant admits the allegations contained in paragraph 12, to the extent the provision of the Social Security Act and regulation is mandatory in nature and does not leave any discretion to the State. Further answering said paragraph, this Defendant affirmatively states that:

MCLA 400.10 designates the Michigan Department of Social Services as the state agency to cooperate with the

federal government in the administration of the Social Security Act, Title IV. In compliance with 45 C.F.R. 201.2, as a condition to the receipt of Federal funds under Title IV, the Michigan Department of Social Services has submitted a *State Plan* for the administration of Title IV-A—Financial Assistance—Aid to Families with Dependent Children. The State Plan as submitted to the Department of Health, Education and Welfare has been approved and certified as being in compliance with federal statutes and regulations, by the Department of Health, Education, and Welfare.

13. Defendant admits such allegations as are consistent with 42 U.S.C. 602(a)(7) and denies such allegations as are inconsistent therewith. The Department of Social Services method of compliance with this section of the Social Security Act is presently found at State Plan Attachment 2.3E page 2 (copy attached as Exhibit A.)

14. Defendant admits that the following are excerpts from 45 C.F.R. 233.20(a)(6) and (7) promulgated based upon Section 402(a)(7) of the Social Security Act:

45 C.F.R. 233.20(a)(6)(IV): "With reference to commissions, wages or salary, the term "earned income" means the total amount, irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or tansportation to call on customers."

45 C.F.R. 233.20(a)(7)(i): "Disregard of earned income; method. (i) Provide that the following method will be used for disregarding earned income: The applicable amounts of earned income to be disregarded will be deducted from the gross amount of "earned income," and all work expenses, personal and nonpersonal, will then be deducted. Only the net remaining will be applied in determining need and the amount of the assistance payment."

State Plan Attachment 2.3-E page 2 sets forth the Department's base for allowing deductions from earned income as published in AP Manual Item 331 for statewide administration. (Exhibit A.)

15. Defendant admits that 45 C.F.R. 206(a)(2)(i) and 206.10(a)(4) are set out in their entirety below:

45 C.F.R. 206(a)(2)(i): "Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program and related services available and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins and pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity."

45 C.F.R. 206.10(a)(4): "Adequate notice shall be sent to applicants and recipients to indicate that assistance, including supplemental payments, has been authorized (including the amount of financial assistance) or that it has been denied or terminated. Under this requirement, adequate notice means a written notice that contains a statement that action taken, and the reasons for and specific regulations support such action, and an explanation of the individual's right to request a hearing."

Further answering said paragraph, this Defendant states that the regulations cited above delineate requirements for State plans under Title IV-A of the Social Security Act. It is the department's position that this requirement mandates that information be provided regarding components of the AFDC program and the rights and responsibilities of applicants and recipients in relation to those components.

This position is also derived in part from another provision of federal regulations (45 C.F.R. 205.10(a)(3)). This subsection obligates the department to provide writ-

ten notice of a right to a hearing "at the time of application and at the time of any action affecting his claim." A claim for assistance is affected only by a proposed change or reduction in one or more of the standard allowances in the approved state plan.

45 C.F.R. 206.10(a)(7) states "In cases of proposed action to terminate, discontinue, suspend, or reduce assistance, the agency shall give timely and adequate notice. Such notice shall comply with the provisions of 205.10 of this chapter." Such actions are not proposed in relation to benefits not included as part of the approved State standard of assitance.

16. Defendant admits such allegations as are consistent with MCLA 400.9; MSA 16.409 and Assistance Payments Manual, Item 331 and denies such allegations as are inconsistent therewith. Defendant further notes that AP Manual Item 331, page 2, effective 9-1-78 *Expenses of Employment*, states "$40 is to be used as the standard expense of employment allowance intended to cover expenses incurred by the employed client in earning income. . . ."

State Plan Attachment 2.3-E page 2 (Exhibit A) outlines the Department's provision of this allowance. "A flat amount of $40 is used for any or all of the items indicated in the righthand column above. However, when a recipient can establish that the reasonable expenses of employment, in or out of the flat amount, exceed the flat amount, the expense is allowed." The checked items are: lunches, transportation to and from work, special uniforms, and incidentals.

AP Manual Item 331, page 3, effective 2-1-79, *Expenses of Employment*, states "If the client claims more expenses than the standard deduction, the actual expense may be allowed as deductions in determining the net budgetable earned income but only if the following conditions are met . . . actual expenses must be . . . specifically attributable to earning of income . . . itemized in the Remarks section of the family's current DSS-2D,

Budget Sheet must be verified by receipts and . . . is for an appropriate and reasonable dollar amount for each such expense."

Day Care as an Expense—"Since day care is provided to recipients without cost and to non-recipients either without cost or a partial cost based on income, it is not considered an expense of employment for applicants or recipients."

State Plan Attachment 2.3-E, page 2 under the heading "*For employees, the expenses of employment considered are those checked in the following table.* Checked under *child care provided as:* "Service provided or purchased by agency." HEW in its approval allows the Department to consider child care separately from other expenses of employment, as being met by the Department's purchase of these services for the client. Therefore, there is no provision for meeting other costs than those met by the Department child care payment.

The day care payments now provided without cost under Title XX of the Social Security Act will be, as soon as legislative approval is obtained, covered out of Title IV-A finds solely as a deduction to client income. (See Dempsey affidavit-Exhibit B)

17. Defendant admits that the rates cited by the Plaintiffs can be found as reported, in Services Manual Item A-446 effective 9-23-79. These are the maximum rates the Department can pay for the In-Home and Out-of-Home care of children. However, those rates will have no application once the finding source is switched from Title XX of the Act to Title IV-A for child care.

18. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

19. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs. Further answering said paragraph,

Defendant states that the Department is under no obligation to provide applicants for or recipients of assistance with a determination of eligibility for payment in excess of the state AFDC standards. All determinations for applicants and only negative case determinations for recipients, based on approved state standards, require notices of the proposed action and the right of a client to an administrative hearing. Therefore, as the method used by the Department in meeting day care costs of employed AFDC recipients is within the State's approved plan for Title XX the AP worker is under no obligation to send notice to the recipient regarding non-payment of child care in excess of the Department's child care payment.

20. Defendant admits the allegations in paragraph 20.

21. Defendant admits that Plaintiff Blessing began receiving ADC in Washtenaw County approximately October 3, 1979 having had her case transferred from Lenawee County. As of September 4, 1979, she was leasing a residence in Milan, Michigan.

22. Defendant admits that Ms. Blessing began reporting income to the Washtenaw County office in September, 1979. That information is the only source of the Department's knowledge of her employment income.

23. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

24. Defendant is informed and believes that Ms. Blessing's employment related child care requirements for her children are approximately as follows:

Kelly: 6 hours per day

Sonya: 3 hours per day

25. Defendant admits that the rates for licensed family day care homes are: $5.24 daily for child care over 5 hours; $3.24 daily for less than 5 hours a day. Kelly (aged 5) requires over 5 hours of care daily; Sonya

(aged 8) requires less than 5 = $8.48 which is maximum rate for this case. As to the actual cost Plaintiff Blessing has incurred for child care such costs only became known to Defendant in administrative hearing and to the extent allowable under federal law and regulation the Plaintiff was provided with payment for such costs pursuant to the hearing decision rendered May 2, 1980 (Exhibit C).

26. Defendant admits that Plaintiff Blessing was required to fill out forms relative to earned income particularly Form DSS-2C (Rev. 7-76) (Exhibit D) which on its face indicates spaces for work expenses and which particular expenses are deductible. Plaintiff Blessing's case was handled pursuant to the state plan provisions and manual items cited and explained above.

27. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

28. Defendant admits that 18.5 cents per mile is the rate used by the Department to reimburse for use of a car. See form DSS-3449 Itemization of Basic Budgetary Allowances, dated 11/24/79 sent to client after her September earning required a budget change. There are three such letters, subsequent to this date in the case record. Above the worker's signature on this form a clear reference to a hearing is made. (Exhibit E).

29. Defendant admits that Plaintiff Blessing submitted to the county department the form attached as Exhibit A to the complaint which was processed by the Department. As to the car repair costs, they were allowed as a deduction, initially, in error and the child care expenses above the amounts paid under Title XX were afforded Ms. Blessing after administrative hearing.

30. Defendant admits the allegations contained in paragraph 30. Based on that hearing request, Ms. Blessing received a decision after hearing affording her all the relief to which she is entitled in this matter.

31. Defendant admits the allegations contained in paragraph 31, except for the reference to "Intake Supervisor" which should be "Ongoing Supervisor" instead.

32. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

33. Defendant admits that correspondence on the question of allowable expenses related to employment for ADC recipients has been received by him from Paul Webb of HEW (now the Department of Health and Human Services) (Complaint, Exhibits D & E). However, the remaining allegations of said paragraph are denied.

34. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

35. Plaintiff MWRO lack standing to raise alleged injuries to unnamed or identified members of its organization and to seek relief on their behalf before this Court.

36. Defendant denies that its method of reimbursing ADC recipients for work related expenses, including child care violates the Supremacy Clause of the U.S. Constitution.

37. Defendant denies that Plaintiff Blessing or alleged class members failed to be given proper notice of their rights to claim appropriate work expenses and to request a hearing where negative action was taken by the Department.

38. Defendant denies violation of the Equal Protection Clause of the U.S. Constitution and in support of said denial affirmatively states that the classification in question was rationally based.

39. Defendant denies the allegations contained in paragraph 39.

AFFIRMATIVE DEFENSES

A. Plaintiffs have failed to properly invoke the subject matter jurisdiction of this Court pursuant to 28 U.S.C. 1343(3) as their constitutional claims of denial of due process and equal protection are frivolous and the Supremacy Clause claim is not cognizable under 42 U.S.C. 1983 so as to give rise to jurisdiction under 42 U.S.C. 1343(3).

B. Plaintiff MWRO lacks standing before this Court to seek any relief on behalf of unidentified members of its organization.

C. Plaintiff Blessing has been afforded all the relief sought herein by hearing decision of an administrative law judge which renders her claim moot and she should be dismissed as a named Plaintiff herein.

D. Defendant's changing of the funding source for child care from Title XX to Title IV-A for employed ADC recipients, renders the declaratory and injunctive claims associated with requested recognition of expenses above the rates outlined in the Services Manual moot.

E. Any and all claims for monetary relief made herein, including retroactive relief, payable out of the state treasury is barred by the U.S. Constitution, Eleventh Amendment.

WHEREFORE, Defendant prays this Court will take the following action:

a) Decline jurisdiction in this matter.

b) Deny class certification in this matter.

c) Deny all relief requested by Plaintiffs both declaratory and injunctive in nature.

d) Dismiss all claims made herein or at least such claims as are moot.

e) Afford Defendant his costs so wrongfully incurred and such other or further relief as is equitable in good conscience.

FRANK J. KELLEY
Attorney General

JANIS MEIJA
Assistant Attorney General

/s/ Robert N. Rosenberg
ROBERT N. ROSENBERG
Assistant Attorney General

512 Commerce Center
Lansing, Michigan 48913
Phone: (517) 373-7700

Dated: June 3, 1980

IV-A STATE OF MICHIGAN

2. For employees, the expenses of employment considered are those checked in the following table.

Item	Included in flat amount
[x] Mandatory payroll deductions	[ ]
[x] Lunches	[X]
[x] Transportation to and from work	[X]
[ ] Tools	[ ]
[ ] Materials	[ ]
[x] Special uniforms	[X]
[ ] Transportation to call on customers	[ ]
Other:	
[x] Incidentals	[X]
[ ] _____	[ ]
[ ] _____	[ ]

Child care provided as:

[ ] Cost of care expended by worker.

[X] Service provided or purchased by agency.

[X] A flat amount of $40.00 is used for any or all of the items indicated in the righthand column above. However when a recipient can establish that the reasonable expenses of employment, in or out of the flat amount, exceed the flat amount, the expense is allowed.

[ ] No flat amount is used.

[ ] Other limitations are imposed, as described in operating manual material submitted to the Regional Office.

(continued)

Approval Date 11-1-76 Effective Date 9-2-76

Ev. A.

BEST AVAI

Report income received during:

MONTHLY INCOME REPORT

Michigan Department of Social Services

ADC Case Number	ADC Unit/Wkr. No.	Co. Cd.	ADC Worker's Name	Phone Number

Client's Name

Address (Number and Street)

City, State, Zip Code

COUNTY RETURN ADDRESS

INSTRUCTIONS: This income report is needed to determine your grant amount. Fill in this form completely on the last day of the month shown above. Sign and mail to your County Department of Social Services Office in the enclosed stamped envelope. **If you do not report your income to the County Department of Social Services Office by the 5th (FIFTH) of the month after the month shown above, we will be unable to determine your eligibility for assistance, and your payments may stop.** Be sure to answer each question and sign the form.

INCOME TO REPORT: If you earned, received or stopped receiving income or had a change in other income during the report month, list all income and report below. Income includes EARNINGS (salary, wages, tips, commissions and bonuses); free housing or utilities; UNEMPLOYMENT INSURANCE/DISABILITY INSURANCE, workmens compensation, strike benefits, training allowances or incentive payments; SOCIAL SECURITY/RAILROAD RETIREMENT, supplemental security income (SSI), pensions, business, farm, rental, CHILD SUPPORT, or other contributions paid directly to a family member; MILITARY BENEFITS, settlements, tax refunds, and any other money you receive. **DO NOT REPORT YOUR ADC, MEDICAL ASSISTANCE, GENERAL ASSISTANCE, OR FOOD STAMP BENEFITS.**

WHO RECEIVED INCOME, MONEY, OR BENEFITS	SOURCE OF INCOME, MONEY, OR BENEFITS (If earnings, list employer and employer's address)	HOURS WORKED	DATE(S) RECEIVED	GROSS AMOUNT (Before deductions)
				$
				$
				$

YOU MUST SEND ALL PAY STUBS FOR EARNED INCOME OR VERIFICATION OF CHANGES IN OTHER INCOME WITH THIS FORM. IF YOU DO NOT KNOW WHAT VERIFICATION YOU MUST SEND, CONTACT YOUR ADC WORKER.

WORK EXPENSES: Complete for earned income only.

If you had earned income from employment (whether as an employee or from self-employment) you are entitled to a $40 deduction for your personal work related expenses each month. When your expenses are greater than $40 you may choose to claim the actual expenses by listing your work related expenses below. If actual expenses are claimed, **YOU MUST ATTACH RECEIPTS.**

IF YOU WISH TO CLAIM ACTUAL EXPENSES, complete the report below:

Person Claiming Expenses	Days Worked	Hours Worked	TRANSPORTATION EXPENSES (Attach receipts)				OTHER WORK EXPENSES — Required work uniforms, or tools, items, mandatory insurance or union dues, etc. (Attach receipts)	
			Method (car, carpool, bus, etc.)	Days using this method	Daily cost round trip	Daily Miles round trip	Items	Amount
					$			$
					$			$
					$			$

INCOME FROM SELF-EMPLOYMENT: If you were self-employed, attach a separate sheet of paper, if needed, listing and explaining business operating expenses *(attach receipts for business expenses claimed).*

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT.

Client's Signature

Date Signed

DSS-2C (Rev. 7-78) (This form is designed to work with County Envelopes DSS-155 and DPS-339)

LABLE COPY

ITEMIZATION OF BASIC BUDGETARY ALLOWANCES
Michigan Department of Social Services

Name				
Case Number: R 3115 818 11				Date: 11/24/79
County	District	Unit: 3 C 2	Worker	Other I.D. (As Required)

Gail Clemens
94 W Main
Milan, Mi. 48160

Under the provision of the Social Security Act, Michigan is required to establish a standard to be used in determining the amount of assistance for which an individual or family is eligible. The standardized requirements below were established on the basis of average consumption patterns and may not represent the actual expenses of your family. Shelter is allowed in the actual amount paid up to the State shelter maximum for your county.

Below is a listing of your basic monthly budgetary allowances as determined at:

- ☐ Application
- ☑ Redetermination — Date Effective: 11-1-79
- ☑ Change in Your Circumstances

	APPLICATION	REDETERMINATION	CHANGE
☐ Shelter Allowance		160	
☐ Personal Needs (food, clothing, incidentals)		219	
☐ Heating Fuel		50	
☐ Utilities		26	
☐ Special Needs			
☐ Special Needs			
TOTAL REQUIREMENTS		455	
☐ Net Income Deducted		364	
AMOUNT OF GRANT		91	

* If you need further clarification of your assistance budget or you believe any action of the Department is incorrect, improper or illegal, you may ask for a review, conference or a hearing. This may be done by notifying the local DSS office by telephone, in person, or in written form. The State requires that all requests for a hearing be in written form. These may be sent to your local department or Central Office.

Your Ongoing Caseworker is _____ ←

Very truly yours,
S. Dellarriele
Assistance Payments Worker

DSS-3449 (Rev. 12-78) Previous edition obsolete.

DISTRIBUTION: White - Client; Blue - Case Record

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STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES
BUREAU OF ADMINISTRATIVE HEARINGS

Reg. No: 80-04373 (1121)
Case No: C81 K8115818A
Hearing Date: 4-17-80
County: Wayne DSS

IN THE MATTER OF: GAIL BLESSING, CLAIMANT

HEARING DECISION

EXHIBITS ADMITTED INTO EVIDENCE

Claimant Exhibit A—Receipt/February 25, 1980

Claimant Exhibit B—Three receipts for child care costs for 2/8/80, 1/25/80 and 4/80

Claimant Exhibit C—Copy of cancelled checks drawn on claimant's account, checks #147, #131, #119

Claimant Exhibit D—Copy of cancelled checks drawn on claimant's account, checks #155, #174, #183

Department Exhibit #1—Budget Sheet, effective date 10/16/79

Department Exhibit #2—Budget Sheet, effective date 11/1/79

Department Exhibit #3—Monthly income report, DSS-2C, signed 10/31/79

Department Exhibit #4—Budget Sheet, effective 12/1/79

Department Exhibit #5—Budget income report, Department Form 2C, signed 11/30/79

Department Exhibit #5—Budget sheet, effective date 1/1/80

Department Exhibit #6—Monthly income report, Department Form 2C, signed 1/1/80

Department Exhibit #7—Budget Sheet, effective date 2/1/80

Department Exhibit #8—Monthly income report, Department Form 2C, signed 2/1/80

Department Exhibit #9—Budget Sheet, effective March 1, 1980

This case is before the undersigned Administrative Law Judge pursuant to MCLA 400.37; MSA 16.437 and MCLA 400.9; MSA 16.409 upon the claimant's request for a hearing to protest the department's failure to budget child care costs as work related expense and failure to inform the claimant of a method to deduct actual mileage expenses.

ISSUES

(1) Whether the department's denial of budgeting claimant's child care costs as work-related expenses was correct?

(2) Whether the claimant was informed of her right to list actual transportation expenses as an expense of employment for grant budgeting purposes?

FINDINGS OF FACT

Having had an opportunity to observe the demeanor of the witnesses, based upon the substantial weight of the credible evidence presented, the Administrative Law Judge makes the following pertinent findings:

(1) That claimant is an employed ADC recipient.

(2) That claimant employs a day care provider recommended by the department.

(3) The claimant's day care costs are above the amount allotted or granted by the department.

(4) The department has refused to accept the claimant's day care costs as actual expenses of employment for granting budgeting purposes.

(5) The claimant uses her automobile for transportation to and from work.

(6) The claimant has been informed in writing that actual transportation costs relating to work can be deducted from income for budgeting purposes.

(7) The claimant did not submit or request actual transportation expenses because of her confusion regarding verification requirements.

CONCLUSIONS OF LAW

This Administrative Law Judge agrees with the claimant's position in part. The decision of Administrative Law Judge Baslinger relating to the same issue in the case number 81-K3710556A, hearing held January 18, 1980, is adopted in pertinent part as follows:

The Aid to Dependent Children (ADC) program is established by Title IV-A of the Social Security Act, implemented by federal and state regulations, and administered in Michigan by the Department of Social Services (the department) according to its Assistance Payments Manual (APM).

The Social Security Act at 42 USC 602(a)(8), requires that "the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . as well as any expenses reasonably attributable to the earning of such income."

The relevant federal regulation, 45 CFR 233.20(a)(3)(iv), mandates that ". . . in determining the availability of income and resources, the following will not be included as income: (a) income equal to expenses reasonably attributable to the earning of income . . . ."

APM, Item 331, page 3, provides, concerning expenses of employment:

If the client claims more expenses than the standard deduction, the actual expenses may be allowed as deductions in determining the net budgetable earned income but only if the following conditions are met:

- actual expenses claimed must be personal expenses incurred by the employed client that can be specifically attributable to the earning of income.
- actual expenses claimed must be itemized in the Remarks section of the familiy's current DSS-2D, Budget Sheet.
- the amounts itemized must be verified by receipts and must be reported monthly along with income, by the fifth of the month following the month the income was received.
- the AP worker must determine whether or not each item listed is for an appropriate and reasonable dollar amount for such an expense."

At the hearing, the worker pointed out APM Item 331, page 3, which reads in pertinent part:

> "Since day care is provided to recipients without cost and to nonrecipients either without cost or at partial cost based on income, it is not considered an expense of employment for applicants or recipients."

Where, as here, the full cost to claimant of the day care services which are necessary to enable her to maintain employment is not provided by the department, the additional cost to her is reasonably related to the earning of income and, under the federal law cited above, is considered a deductible work-related expense. The APM Item to which the worker referred goes beyond the statute and regulation in restricting the use of the deduction, and therefore cannot be used as a basis to deny claimant consideration of her cost of day care as a work-related expense.

The aforestated manual item has been changed the effective date being April of 1980. The new item is silent with regard to child care expenses as claimed expenses of employment. It can be inferred that the department intends to continue its policy of disallowing said claim for the same reasons as aforestated. It must be concluded that the disallowance of child care costs above the amount contributed by the department would be improper.

The second issue to be decided is the claimant's claim for transportation expenses incurred for employment. It is the claimant's position that the department failed to adequately inform her of her rights to deduct mileage expenses from income for grant budgeting purposes. It has been determined that the claimant had reported her income on numerous occasions using department form DSS-2C which are exhibits and part of this opinion. This form contains simple instructions for reporting expenses above the standard allowance. The claimant's own testimony revealed she was aware that mileage expense could be deducted but she did not understand how to verify said costs. At this point, the claimant became aware of her rights under the program; the department obviously met its obligation and was in compliance with 45 CFR 206.10(a)(2)(i). The claimant's confusion as to her rights in this case arose not from the department's information but from the claimant's own circumstances. The department would have no way of knowing that the claimant could not discern some method of verifying her mileage or travel expenses. If the claimant had approached the department and the department did not proceed to clarify their position as it related to her circumstances, then the department would have failed in its obligation to inform the claimant of her rights under the program. However, these were not the circumstances in this case.

Having found no "incorrect action" on the part of the department, a ruling granting retroactive payments would be improper.

DECISION AND ORDER

The Administrative Law Judge, upon the above findings of facts and conclusions of law, decides that the noninclusion of the claimant's child care contribution or costs as an expense of employment for ADC budgeting purposes is incorrect. It is further found that the department has given the claimant adequate information relating to transportation expense deductions.

Accordingly, the department is ordered to recompute the claimant's budget for the length of her employment to reflect her child care costs and grant her supplementation accordingly. The department is further ordered to consider the claimant's child care costs in computing her future monthly budgets. In computing the supplementation and future budgets, the department is to deduct the amount the claimant receives from the department for child care.

/s/ Martin J. Lofman
MARTIN J. LOFMAN
Administrative Law Judge

Date signed: May 2, 1980

Date mailed: May 08 1980

NOTICE: The law provides that within 30 days of receipt of the above Decision and Order the claimant may appeal it to the circuit court for the county in which he lives.

ML/dp

cc: Gail Blessing
Washtenaw County DSS
Robert Johnson
Judge Martin J. Lofman
Administrative Hearings (4)
William Dailey
William Barham

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 80 71479

[Title Omitted in Printing]

AFFIDAVIT OF JOHN T. DEMPSEY

STATE OF MICHIGAN)
)
COUNTY OF INGHAM)

JOHN T. DEMPSEY, being first duly sworn, deposes and says as follows:

1. That he is the Director of the Michigan Department of Social Services and has occupied that position since February, 1975.

2. In such capacity, he is responsible for the administration of the Aid to Families with Dependent Children (AFDC) and Title XX Social Services programs in Michigan.

3. That by letter of September 30, 1979, he informed the Director of the Michigan Department of Management and Budget of actions the Department of Social Services intended to take in response to the Governor's request that said Department save $29.0 million of the funds currently budgeted for fiscal year 1979-80. Of the projected savings, $10.0 million was attributed to a shifting of day care expenses of working AFDC recipients from the Title XX program to the AFDC program. (Attachment A.)

4. That the executive budget recommendations submitted by Management and Budget to the heads of the Appropriations Committees of the State legislature as

part of the appropriation process for fiscal year 1980-81 includes the shifting of day care funding to the AFDC program at a projected saving of $6.60 million. (Attachment B.)

5. That, upon legislative approval of the proposed shift in funding from the budget line items for the Title XX program to those for the AFDC (Title IVA) program, the Department will promptly implement all necessary policy changes so that AFDC applicants and recipients who are qualified will, to the extent allowed under federal law and regulation governing that program, be able to have allowable expenses of employment deducted from their earned income to offset a portion of the grant reduction attributable to such income. No Title XX funding will be available for employed AFDC recipients to defray day care costs.

/s/ John T. Dempsey
JOHN T. DEMPSEY
Director,
Michigan Department of
Social Services

Subscribed and sworn to before
me this 2nd day of March, 1980.

/s/ Signature illegible
Notary Public, [Illegible] County,
Michigan

My commission expires: [Illegible]

EXHIBIT A

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES

MEMORANDUM

Date June 20, 1980

To: AP Supervisors (Ann Arbor)
Services Supervisors (Ann Arbor)

From: Ralph Carnegie
Deputy Director

Subject: CIS Message Received 6-20-80 10:50

Local Office Managers: CIS will not be up 6-21-80. See 5-13 memo from FSA.

Instructions on Child Care Costs as an employment expense in adv. AP Bulletin # 80-14 page 3 and attached revisions to Item 331 are to be disregarded. The Legislature's final decision is to continue Day Care Services under Title XX. Child Care expenses may not be allowed in calculating earned Income budgets. All other material in the release is correct. Policy will be modified and rates changed. Details to follow this afternoon or Monday.

RC:yh

cc: Kenneth Oettle
Dave Krehbiel
Jeff Heath
Dean Denslow
Joanne Troy

EXHIBIT B

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES

No. 80-16

ASSISTANCE PAYMENTS MANUAL
BULLETIN

Office of Income Assistance

EFFECTIVE: July 1, 1980

SUBJECT: AP Item 331
Follow-up to Morning VDT Message of June 20, 1980, Regarding Day Care

The purpose of this bulletin is to rescind certain information contained in AP Bulletin 80-14. AP Bulletin 80-14 stated that child care costs were an allowable expense of employment effective 7-1-80, due to termination of Title XX day care payments.

The Department has decided to continue Title XX funding for day care payments. Therefore, references to child care expenses are being deleted from AP Item 331. Child care will not be an allowable expense of employment in calculating budgetable earned income.

Prospective budgets calculated for July and August with a child care deduction allowed must be changed to remove this deduction. This change must be made if it is possible to affect any check(s) for these months. If the case has been opened, timely notice of resulting negative actions must be granted.

Forms DSS-2C and DSS-2CX, Monthly Income Report, contain a space for the client to claim child care expenses.

It is too late to change these forms. Workers must be careful not to include child care in any calculations of actual expenses of employment.

AP MANUAL MAINTENANCE:

New Pages:

AP Item 331, pages 4-6 (Rev. 7-3-80, Eff. 7-1-80)

Obsolete Pages:

AP Item 331, pages 4-7 (Rev. 6-13-80, Eff. 7-1-80, Released with AP Bulletin 80-14)

/s/ Fred Lawless
FRED LAWLESS, Director
Field Services Administration

Approved: /s/ [Signature illegible]
Director

Distribution: AP Manual Holders
Issued: 7-3-80
May be discarded upon completing manual maintenance

EXHIBIT C

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES

No. 80-14

ASSISTANCE PAYMENTS MANUAL
BULLETIN

Office of Income Assistance

EFFECTIVE: July 1, 1980

SUBJECT: AP Item 330, Principles of Budgeting Income

AP Item 331, Earned Income

AP Item 511, Supplemental Payments

AP Item 520, Notice of Case Actions

Federal regulations regarding the reporting and budgeting of income are being implemented. In addition, several clarifications of existing policy have been made.

A summary of the changes follows:

AP Item 330:

(1) Persons who are required to report income monthly must do so by completing a specified-reporting form, in addition to providing appropriate verification.

(2) Form DSS-2C has been revised and retitled, "Monthly Income Report." It may only be used to report income. Form DSS-2C will be machine mailed to clients who are identified on CIS as being required to file a monthly income report. The first forms will be mailed with the warrants for the second half of July, 1980. An insert will be mailed to

all C, S, I, and R clients with the warrants for the first half of July, explaining the reporting requirements.

Form DSS-2CX is an alternate of Form DSS-2C and is designed for hand issuance by the worker.

Samples of Forms DSS-2C, DSS-2CX, and the insert are attached.

(3) The policy regarding treatment of stopped income has changed. Any income received in the base month must be budgeted in the corresponding payment month, unless the income was received and stopped prior to the date of application.

Distribution: AP Manual Holders

Issued: 6-13-80
May be discarded upon completion of manual update.

(4) Earned income from self-employment must be reported and budgeted each month. Policy effective 4-1-80 instructed that self-employment income be averaged. This was done because the policy regarding treatment of stopped income often resulted in much self-employment earnings being excluded, due to the erratic nature of the income. Since the Federal regulations do not recognize stopped income as a situation requiring special treatment, with the exception of income stopped prior to application, this problem will no longer occur.

(5) Fluctuating unearned income, including income which is received weekly or bi-weekly (i.e., UCB) must be reported monthly via the DSS-2C or DSS-2CX, with appropriate verification.

(6) Federal regulations allow waiver of timely notice of negative actions resulting from information reported on the monthly income report form. Michigan has

elected this portion to allow greater flexibility in processing income budgets.

Adequate notice of the action is still required. Therefore, CIS is being modified to allow entry of a negative action date without entry of a "9" as the first position of the negative action code. This will result in generation of a DSS-1605.

(7) Federal regulations require that supplements be made available to clients who request them due to decreased income. The instructions for this type of supplement have been placed in this item, since it is so closely related to the budgeting process.

(8) Policy regarding the exception to prospective budgeting at reapplication has been deleted.

(9) The treatment of income when adding a member to an active case has been clarified under "INCOME IN AN ONGOING CASE."

(10) When income starts, a prospective eligibility budget must be calculated. If the case is ineligible based on the prospective eligibility budget, the case may be closed. If the case is still eligible based on the prospective eligibility budget, actual retrospective income is used to determine the grant.

(11) Use of Report DN-029, "Support Collection vs. Grant" has been clarified. This report was recently revised to include the month in which the report is to be used. A sample is attached.

(12) "VERIFICATION REQUIREMENTS" have been expanded to include guidelines for prospective budgets.

AP Item 331

(1) Policy regarding self-employment has been revised to delete references to reporting requirements and averaging of income.

(2) References to specific types of work as forms of self-employment have been deleted. This has been done to avoid potential problems for the Internal Revenue Service and the Social Security Administration, who have much more specific criteria for determining whether or not a person is self-employed.

It is the client's responsibility to inform the Department if he considers himself self-employed and wishes to claim operating expenses. AP workers are not to instruct clients to claim self-employment status in order to take advantage of AP budgeting procedures.

(3) Clients who wish to claim actual expenses of employment may now include child care costs as an expense of employment reasonably attributable to earning income. Day care payments for employed ADC clients will no longer be paid under Title XX.

Child care expenses are to be allowed in prospective budgets for July and August. For cases on retrospective budgeting, child care expenses paid in July and reported in August will be reflected in calculating the September grant.

A separate memorandum will be released to provide a more detailed explanation of the conversion from Title XX payments to Title IV-A (ADC).

(4) Verification requirements for income from self-employment have been modified; reference to Form DSS-2CX has been added; suggested methods of verification of expenses have been added.

AP Item 511

(1) Policy regarding supplements for decreased income has been added. This deletes the reference to "loss" of income, which is simply treated as a decrease.

(2) Effective 7-1-80, supplements will be authorized on-line to CIS. This coding structure has been changed. Reference to the broad category of "underpayments," as opposed to increased need, has been deleted to allow more specific identification of the reason for supplementation.

The DDS-13 has been revised to reflect new policy and to serve as a CIS input document.

(3) On-line supplements require a great deal of responsibility on the part of local office staff to insure correct application of policy. Therefore, retroactive adjustments due to court orders, and amounts in excess of $1,000 (unless the reason is a retroactive adjustment due to an administrative hearing) must be approved by the local office director or his designee.

(4) Federal regulations require a notice to the client when a request for a supplement is approved or denied.

AP Item 520

(1) Policy regarding required notices for negative actions due to monthly income reports has been added.

(2) This item has been written in the new AP Manual format.

Other

(1) Report RR-030, Monthly Income Report Listing, will be generated each month. This report contains a listing of those cases which are identified on CIS, as of the report run date, as being required to file a monthly report. This report must be used to keep track of those cases that are required to report income monthly. A mock-up of the report is attached.

(2) On June 21, 1980, an automatic conversion will be done to identify cases that will be required to report. A separate conversion notice has been published.

(3) Report GA-790, Supplemental Payments Listing, will be issued each month, with one copy to the worker and one copy to the supervisor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 80 71479

[Title Omitted in Printing]

MEMORANDUM AND ORDER

Plaintiffs moved for class certification in this action against defendant Dempsey in his capacity as director of the Michigan Department of Social Services. Plaintiffs allege that defendant is administering the Aid to Families with Dependent Children (AFDC) program in violation of federal statute and regulations and in violation of their constitutional rights to equal protection of the laws. Plaintiffs move for certification of a class, with themselves as class representatives, defined as:

> . . . all applicants for or recipients of Aid to Families with Dependent Children (AFDC) in Michigan who have claimed or will claim, or who have not been or will not be adequately informed of their right to claim, excess child care costs and other reasonable actual expenses incurred in connection with their employment and have had or will have their eligibility or level of benefits determined without regard to such actual expenses of employment.

Motion for class certification, ¶ 1.

The individual plaintiff, Gail Blessing, is a recipient of AFDC, who requested that the costs of child care and car repair expenses be deducted from her income in determining her level of benefits. Her request was denied. She alleges that she was not initially informed of her right to deduct such expenses and that she was not in-

formed of her right to request a hearing on the denial of the deductions. Plaintiff Blessing filed a request for hearing on March 3, 1980, and had a prehearing conference on March 17, 1980. Exhibits B and C to the complaint was filed on April 11, 1980. Plaintiff received her administrative hearing on April 17, 1980. The complaint was served on April 18, 1980. The Department's administrative decision was issued on May 2, 1980. Exhibit attached to defendant's brief in opposition. Although plaintiff Blessing was not granted all the relief she requested, the administrative decision did hold that she could deduct the actual cost of child care expenses and she was granted a retroactive recomputation of her benefits. Although plaintiffs allege that defendant has refused to allow deductions for several different types of costs of employment, the most specific allegations and the core of their complaint refer to the deduction of child care expenses. In deciding whether plaintiff Blessing is a suitable class representative, we must take into account the fact that she has received the relief she has requested regarding child care expenses.[1]

We note first that we are not dealing here with an attempt by defendant to prevent class certification by granting relief to the potential class representatives. If that were the case, we would not hesitate to hold that defendant could not evade class certification by granting relief to the named plaintiffs. *Blankenship* v. *Secretary of Health, Education and Welfare*, 587 F. 2d 329 (6th Cir. 1978). *Accord, Deposit Guaranty National Bank* v.

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[1] Defendant argues that plaintiff Blessing's claims are entirely moot because of the relief she has received in the administrative hearing. But it is clear that she has not received all the relief she requested. The administrative decision ruled against plaintiff on her claim that she did not receive adequate notice of her right to deduct mileage expenses. Thus Blessing's claims are not all moot, although her child care deduction claim is. The question here is, given the mootness of that child care claim, whether she is an appropriate class representative.

Roper, 48 U.S.L.W. 4279, 4283 (U.S. March 19, 1980). But in this case it is clear that the administrative process that resulted in Blessing's relief was in motion before the complaint was filed and the relief she received was not affected by the filing of this suit and was not an attempt to prevent class certification. A class representative must meet all of the requirements of Federal Rule of Civil Procedure 23(a) and one of the subsections of Federal Rule of Civil Procedure 23(b). In deciding whether plaintiff Blessing is an appropriate class representative, we are concerned primarily with Rule 23(a)(3) and (4). Are plaintiff Blessing's claims now "typical of the claims . . . of the class" and will she "fairly and adequately protect the interests of the class"? We hold that plaintiff Blessing does not meet these requirements.

It is clear that the focus of plaintiff's complaint is the question of deduction of the actual cost of child care expenses. This is the only specific deduction that is consistently cited in the complaint, although the complaint also claims that deductions for "other expenses of employment" were denied. The correspondence from the regional commissioner of the Social Security Administration attached to the complaint, Exhibits D and E, deals only with child care expenses. The complaint clearly alleges that there is a consistent policy of denying deductions for child care expenses. Our reading of the complaint leads us to conclude that this is the only instance where there is a consistent policy resulting in reduction or denial of benefits. Although there may be other instances when other deductions are disallowed, the complaint does not allege a consistent policy with regard to other expenses. Thus, we must conclude that the majority of the members of the proposed class are AFDC applicants or recipients whose deductions for child care expenses were disallowed. This compels us to find that plaintiff Blessing's claims, which no longer include an active claim for deduction of child care expenses, are not typical of the members of the proposed class.

Given this lack of typicality, we doubt whether Blessing can fairly and adequately protect the interests of the members of the proposed class. At the hearing we inquired whether Blessing would be willing to pursue the claim after receiving administrative relief and asked whether she would be willing to bear the cost of continued litigation. Her counsel stated that the Michigan Clinical Law Program, with which he is affiliated, has a litigation fund from which expenses could be paid. But it is not the willingness and zeal of plaintiff's attorney that we are concerned about, but rather that of the proposed class representative. *Cf. LaMar* v. *H. & B. Novelty & Loan Co.*, 489 F. 2d 461, 465 (9th Cir. 1973); 3B Moore's Federal Practice, ¶ 23.07[2], p. 23-218. If plaintiff Blessing has already received relief on the major claim of the class members, her lack of a personal stake raises doubts about whether she would be motivated to pursue that claim on behalf of the class members. With such doubts, we must hold that plaintiff Blessing has not met her burden of showing she is entitled to maintain a class action, *Senter* v. *General Motors Corp.*, 532 F. 2d 511, 522 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976). Because we find that plaintiff Blessing does not meet the requirements of either Rule 23(a)(3) or (4), her motion for class certification must be denied.

Co-plaintiff Michigan Welfare Rights Organization (MWRO) also joins in this motion for class certification. It alleges that it is an association of recipients of public assistance, the majority of whom receive AFDC. Complaint, ¶ 8. It alleges that "some" of its members have contested denial of deductions and have received favorable administrative determinations and that "other recipients and applicants" have not contested denial of deductions. *Id.*, ¶ 19. MWRO states that it has received "numerous complaints" from its members, *id.*, ¶ 32, and that it "believes" that its members have suffered harm. *Id.*, ¶ 35. We have reviewed the complaint and briefs for more particularized allegations of the claims of members

of MWRO and find none. These conclusory allegations are simply not sufficient to establish that the claims of members of MWRO are typical of the claims of the members of the proposed class. Thus, MWRO has not met its burden of showing that it is entitled to maintain a class action. We hold that MWRO does not meet the requirements of Rule 23(a)(3) and that its motion for class certification must be denied.[3]

NOW, THEREFORE, IT IS ORDERED that plaintiffs' motion for class certification be and the same is hereby DENIED.

/s/ Robert E. DeMascio
ROBERT E. DEMASCIO
United States District Judge

Dated: January 9, 1981

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[3] The allegations in the complaint are sufficient to establish MWRO's standing to assert the claims of its members and MWRO is thus a proper plaintiff in this action. *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). Our holding here is limited to the question of MWRO's suitability as a class representative.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 80-71479

[Title Omitted in Printing]

INTERVENOR COMPLAINT FOR DECLARATORY INJUNCTIVE AND OTHER RELIEF

I.

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief to redress the Defendant's failure to administer Michigan's Aid to Families with Dependent Children Program (ADC or AFDC) consistently with the applicable federal statutes and regulations and the Fourteenth Amendment to the United States Constitution. More specifically, Plaintiff-Intervenor alleges that the Defendant has failed to allow ADC applicants and recipients to deduct actual costs of child care from their earned income in determining grant eligibility as required by § 402(a)(7) of the Social Security Act and regulations under the Act, and has failed to give said applicants and recipients adequate notice of their rights and remedies as required by the federal regulations and the Due Process clause of the Fourteenth Amendment to the United States Constitution. Plaintiff-Intervenor further alleges that Defendant's failure to allow child care costs to be deducted while allowing other actual expenses of employment to be deducted draws distinctions among recipients without any rational basis in violation of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

2. Plaintiff-Intervenor brings this suit to request injunctive and declaratory relief on behalf of herself and all persons throughout the State of Michigan who are, have been, or will in the future be adversely affected by the Defendant's policies and practices.

II.

JURISDICTION

3. Plaintiff's actions for declaratory and injunctive relief are authorized by:

(a) 28 USC §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments;

(b) 42 USC § 3983 which provides for redress of any deprivation, under color of state law, of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

4. Jurisdiction is conferred upon this Court by 28 USC § 1343(3), the pendent jurisdiction doctrine and 28 USC § 1331.

III.

CLASS ACTION

5. The individual named Plaintiff-Intervenor brings this action on her own behalf and, pursuant to Rules 23 (a) and 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The members of the class similarly situated to the named Plaintiff-Intervenor are all applicants for and recipients of ADC in Michigan, who have unsuccessfully claimed or will claim, or who have not been or will not be adequately informed of their right to claim, excess child care costs incurred in connection with their employment, and who consequently have had their eligibility or level of benefits determined without regard to such actual expense of employment.

6. The requirements of Rule 23 are met in that: the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of all class members; the representative parties will fairly and adequately protect the interests of the class; and the party opposing the class has acted on grounds generally applicable to the class, i.e., failing to consider all reasonable costs as actual expenses of employment, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

IV.

PLAINTIFF-INTERVENOR

7. The individual named Plaintiff-Intervenor is a current recipient of benefits under the ADC Program, who has requested that the cost of child care necessitated by her employment be deducted from her earned income as an actual expense of employment in the determination of the amount of her ADC grant and whose request has been denied.

V.

DEFENDANT

8. The Defendant John T. Dempsey is the Director of the Michigan Department of Social Services (the "single state agency" for Michigan under Title IV of the Social Security Act) and is responsible for development of departmental policy regarding the ADC program, implementation of rules and regulations of the Department for administering the said program in accordance with the applicable rules and regulations of the Federal government under MCLA 400.10, and 42 USC § 602.

VI.

FACTUAL ALLEGATIONS

9. Defendant Dempsey must comply with the Social Security Act and applicable federal regulations thereunder promulgated by the Department of Health, Education and Welfare (HEW) in order for the Michigan Department of Social Services (the Department) to continue to receive matching federal funds.

10. The Social Security Act, in 42 USC § 602(a)(7) requires that the State Department consider "any expenses reasonably attributable to the earning" of income in determining eligibility for AFDC.

11. Regulations promulgated by HEW in 45 CFR §§ 233.20(a)(6)(iv) and (7)(i) require that "all work expenses" be deducted from earned income in determining need.

12. Regulations promulgated by HEW in 45 CFR § 206.10(a)(2)(i) and (4) require that adequate notice of an applicant's rights be given and 45 CFR § 205.10 (a) requires that whenever action is taken on an ADC case, notice of hearing rights must be given.

13. Section 402(a)(1) of the Social Security Act and regulations promulgated by HEW in 45 CFR § 205.120 (1979) require that a state plan for aid to needy families operate on a statewide basis in accordance with equitable standards for assistance and administration that are mandatory throughout the state.

14. The defendant has promulgated and is responsible for enforcing certain state regulations regarding the determination of need pursuant to MCLA 400.9; MSA 16.409. Such regulations provide a standard work expense deduction of $40.00 per month for working applicants or recipients of ADC. Such regulations provide further, in Assistance Payments Manual Item 331, page 4, for deduction of certain expenses for transportation, meals, mandatory payroll deductions and required related

clothing in arriving at net budgetable earned income, and can be verified by receipts or otherwise, but do not allow for deduction costs of child care necessary to allow a recipient or applicant to work. Assistance Payments Manual Bulletin Letter 80-16 provides that child care is "not an allowable expense of employment in calculating budgetable earned income."

15. The defendant administers another program implemented as part of Michigan's plan for social services under Title XX of the Social Security Act, 42 USC § 1397, *et seq.* That program provides, as set forth in Services Manual Item A-416, page 2a, that all employed recipients of ADC qualify for Department payment of the full cost of child care up to maximums set by the Department.

17. Many applicants for and recipients of ADC have not been informed that they can deduct excess child care costs as an actual expense of employment or have requested, but have been denied, such deduction and have not been informed of their right to a hearing on that matter.

18. Some applicants and recipients who protest such denials, despite lack of notice as to their rights, are eventually allowed the child care deduction, despite the contrary published regulations of the Department, usually after an administrative hearing.

19. Plaintiff-Intervenor Johnny Green resides in Ypsilanti, Michigan. At all times pertinent hereto, she is and was a recipient of ADC (case number K8148787A) through the Washtenaw County Department of Social Services on behalf of herself and her child because of the continued absence from the home of the child's father.

20. In November 1979 Ms. Green began working in Ann Arbor, Michigan, being paid $333.00 every two weeks for approximately 40 hours per week. She has continued to work up to the present time.

21. Ms. Green's employer's place of business is 10 miles from her home and she must travel that distance

daily. At first she drove her car, but it has since expired. She now takes a bus at a cost of $1.50 per day for a weekly total of $7.50.

22. Because of her job, Ms. Green has had to make arrangements for the care of her child while she is at work. Approximately 42.5 hours of day care are necessary for her child each week.

23. The maximum rate which the defendant will pay for licensed day care for her child is $35.00 per week. Though she has tried, Ms. Green has been unable to find suitable day care at a cost within this limit. The cheapest suitable day care arrangement which she has been able to procure costs $50.00 per week for an average cost of $10.00 per day. This means that Ms. Green must pay approximately $15.00 per week for day care above the $35.00 provided by the Department.

24. For the first year of her employment, Ms. Green was able to find a child care center which would care for her child for the Title XX amount paid by the Department. However, in October 1980, building authorities forced that center to close and Ms. Green was required to find another provider. In November 1980, that provider charged, and Ms. Green paid, $39.00 for care of her child while at work. A receipt for this amount is attached to this Complaint as Plaintiff-Intervenor's Exhibit A.

25. After learning from a Michigan Legal Services Newsletter that federal law required that child costs be allowed as a work expense, Ms. Green requested a work expense deduction for the $39.00 in day care which she had paid on the monthly income report form which she filed with her caseworker on December 5, 1980. Her caseworker denied the request and informed her by a letter dated December 1980 that "[b]abysitting is not an allowable deduction of work expenses." A copy of this letter is attached to this Complaint as Plaintiff-Intervenor's Exhibit B. Since having her request denied, Ms. Green continues to pay approximately $15.00 per week.

Copies of receipts dated December 12, 1980 and January 15, 1981 for her payments through January 9, 1981 are attached as Exhibits C and D.

26. At no time was Ms. Green informed by employees of the Department of Social Services that her actual expenses for child care could be allowed as a deduction nor was she informed of her right to a hearing following denial of her request to have them allowed as a deduction.

27. A number of other applicants for and recipients of ADC have complained of the Department's failure to allow excess child care costs as deductions from earned income. On their behalf, attorneys from the office of Legal Services of Southeastern Michigan initiated a correspondence with Defendant and with Paul E. Webb, Regional Commissioner of the Department of Health, Education and Welfare (HEW), requesting that Item 331 of the AP Manual be changed. Mr. Webb, in a letter dated May 9, 1978, advised Defendant Dempsey that "if the amount [of child care allowance] under your service plan does not meet the actual cost of child care, it will be necessary to revise your Title IV-A plan to assure that all actual reasonable expenses of employment are considered." A copy of that letter is attached as Plaintiff's Exhibit E and by this reference incorporated herein. A subsequent letter from Mr. Webb, dated October 10, 1978, again refers to the illegality of the prohibition on deducting child care expenses in Item 331 stating: "If AFDC applicants and recipients are being required to pay excess child care costs, please advise us what corrective actions you intend to take to obtain compliance with Section 402(a)(7) of the Social Security Act". A copy of that letter is attached as Plaintiff's Exhibit F and by this reference incorporated herein. Despite being apprised of the Item's illegality, Defendant has failed to change the policy and has offered no reasonable explanation for failing to do so. As a consequence a great number of applicants and recipients are daily being denied the benefits which Congress has clearly intended that they be provided.

28. On May 29, 1980, Defendant Dempsey wrote to the Department of HEW and again inquired as to the legality of a maximum deduction for day care as an expense of employment and received a reply dated December 15, 1980, from Ira Goldstein, Acting Associate Commissioner for Family Assistance, indicating that such maximum limitations on deductions would violate § 402 (a) (7) and (8) of the Social Security Act. Copies of the letters of Mr. Dempsey and Mr. Goldstein are attached to this Complaint as Plaintiff-Intervenor's Exhibits G and H respectively.

VII.

FIRST CLAIM FOR RELIEF

29. The failures of the Defendant Dempsey, as set forth above, to allow Plaintiff-Intervenor and her class to claim actual costs of child care when they exceed the standard $40 per month work expense allowance violates the requirements of § 402(a) (7) of the Social Security Act, 42 USC § 602(a) (7), and the regulations thereunder, 45 CFR §§ 233.20(a) (6) (iv) and (a) (7) (i) and therefore contravene the Supremacy Clause of the United States Constitution.

VIII.

SECOND CLAIM FOR RELIEF

30. The failures of the Defendant Dempsey, as set forth above, to require that applicants for and recipients of ADC be clearly informed of their right to claim actual work expenses which exceed the standard amount, including child care costs in excess of the Department of Social Services subsidy and mileage, and of their right to request an administrative hearing to contest Defendant's employees' refusals and failures to include as work expense deductions all actual expenses incurred in connection with employment, including child care costs in excess of the

subsidy provided violate the rights of Plaintiff-Intervenor and her class under 45 CFR § 206.10(a)(2)(i) and (a)(4), 45 CFR § 205.10(2)(3), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

IX.

THIRD CLAIM FOR RELIEF

31. The Defendant, by promulgating and carrying out the provisions of AP Manual Item 331, allows some actual work expenses to be deducted, but disallows child care expenses in excess of the maximum subsidy paid by the Department. In light of the purposes of the ADC program, no rational basis exists for allowing some actual expenses of employment but not allowing others. Consequently, the distinction drawn in Item 331 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

FOURTH CLAIM FOR RELIEF

32. The practices and policies of the Defendant, as set forth above, violate the requirements of Section 402(a)(1) and (3) of the Social Security Act, 42 USC § 602(a)(1) and (3), and the regulations promulgated thereunder, 45 CFR § 205.120, which require that a state's AFDC plan operate on a statewide basis with equitable standards of assistance and administration that are mandatory [illegible], in that

(a) some ADC recipients and applicants who have child care expenses are informed that such a deduction is not allowed and are forced to bear the expense of child care over the Title XX amount themselves, while others are allowed such deductions, generally after an administrative hearing is requested and held; and

(b) among those ADC applicants and recipients who request hearings, whether or not the deduction is granted is decided, not according to any consistent written policy,

but according to the view of each individual Administrative Law Judge regarding the validity of official Department policy in light of contrary federal law.

X.

EQUITY

33. Plaintiff-Intervenor and the class she represents, have no plain adequate or complete remedy at law to redress the above stated deprivations of their federal and state constitutional, statutory, and regulatory rights, and are suffering and will continue to suffer irreparable harm therefrom unless relief sought herein is granted by this Court.

RELIEF

WHEREFORE, Plaintiff-Intervenor, on behalf of herself and all others similarly situated, prays that this court:

(a) Assume jurisdiction of this cause pursuant to 28 USC §§ 1343 and 1331;

(b) Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action may be maintained as a class action;

(c) Enter a final judgment, declaring that the Defendant Dempsey's action in denying full deduction of all actual expenses, including child care costs, as expenses of employment, violates the Social Security Act, 42 USC § 601 *et seq.*, the regulations thereunder; and the Equal Protection Clause;

(d) Enter a final judgment declaring that the Defendant's action in failing to give adequate notice of recipients and applicants with respect to the deduction of actual employment-related expenses and of their rights to a hearing, violates the Social Security Act, 42 USC § 601 *et seq.*, the regulations thereunder, and the Due Process Clause;

(e) Enter preliminary and permanent Injunctions enjoining the Defendant, his officers, agents, employees and persons in active concert or participation with him from denying all reasonable expenses, including excess child care costs, as actual expenses of employment, and from failing to inform applicants and recipients of their rights to deduct such expenses and to obtain an administrative hearing.

(f) Allow Plaintiff-Intervenor her costs and reasonable attorney's fees and grant her and all persons similarly situated such additional or alternative relief as may seem to this Court to be just and equitable.

DATED: February 13, 1981

WILLIAM BURNHAM (P23286)
Attorney for Plaintiff-Intervenor
Wayne State University Law School
468 W. Ferry
Detroit, MI 48202
313-577-4827 or 3928

EDWARD HOORT (P25561)
Attorney for Plaintiff-Intervenor
Michigan Legal Services
900 Michigan Building
220 Bagley Avenue
Detroit, MI 48226

Student Attorney:

JANE WILLIAMS
Wayne State University Law School
Clinical Program
468 W. Ferry
Detroit, MI 48202

PLAINTIFF-INTERVENOR EXHIBIT G
STATE OF MICHIGAN

WILLIAM G. MILLIKEN, GOVERNOR
DEPARTMENT OF SOCIAL SERVICES
300 South Capitol Avenue
P.O. Box 30037
Lansing, Michigan 48909
JOHN T. DEMPSEY, Director

May 29, 1980

Ira Goldstein, Director
Office of Policy
Trans Point Building, Room B428
2100 Second Street, S. W.
Washington, D. C. 20024

Dear Mr. Goldstein:

I am writing in reference to an issue which is of critical importance to both cost and efficient administration of the AFDC program in Michigan as well as other states.

The Michigan Welfare Rights Organization recently filed suit against the Michigan Department of Social Services in Federal District Court on behalf of an AFDC recipient, Gail Blessing. The suit alleges that the department has failed to allow employed AFDC recipients to deduct actual costs of day care as an expense of employment from earned income in determining the amount of assistance. The plaintiffs contend through the suit that the department may not establish reasonable limitations for expenses atributable to earning income. A copy of the case is attached.

The crux of the issue is whether states can manage their finite fiscal resources in order to insure both efficient administration of the AFDC program and that a reasonable amount of assistance is granted to as many eligible recipients as possible. To hold that a state may not estab-

lish and maintain reasonable ceilings invites abuse through the fact that providers will be encouraged to request whatever rate they wish since the department is not able to maintain control of the rate structure. While rates paid by non-AFDC recipients may be negotiated between the provider and the payor, the department may be forced to pay above the going rate because of the lack of ability to negotiate or establish a reasonable rate structure.

Another obvious result of a decision that the state may not maintain a reasonable rate structure will be unlimited caseload expansion through reduction of the amount of budgetable income.

In addition, many cases will be eligible for assistance for a longer period of time than otherwise necessary if it is not possible to establish some reasonable ceilings on expenses of employment. I'm sure you realize that fiscal resources, at both federal and state levels, are not unlimited and that some governmental units must operate within the limitation of appropriated funds. While it is not the purpose of reasonably established standards to work as a screening mechanism for potentially eligible recipients neither should significant numbers of persons become eligible for assistance as a result of artificially inflated payment rates. A reasonable approach would seem to be that if employed recipients negotiate for a higher standard of service than is standard for the community or paid by non-recipients, that a portion of the earned income disregard could be used for this purpose.

The logical conclusion to a decision that the department may not utilize a reasonable rate structure will be that there can, in fact, be no limitation on any expenses claimed by employed recipients. In this position, the department would be without the legal ability to place limitations on expenses for automobile payments, repair bills, insurance premiums, or any item which is claimed as even remotely related to employment.

I believe that the establishment and maintenance of reasonable rate structure is an established and necessary principle of efficient government operation. Such a mechanism is the only real tool available to state agencies to manage their fiscal resources. I am pleased to note congressional intent in this area through the establishment of a flat percentage for expenses of employment which is included in House Bill 3434. We simply cannot provide for unlimited deductions in a time of limited resources. Therefore, it is our intent to establish a maximum deduction for day care as an expense of employment.

I urge you to consider this matter thoroughly and request your support for the establishment of a reasonable maximum for employment deductions. It is especially important in light of strained fiscal resources at both the federal and state levels of government, and the intent of Congress in developing welfare reform legislation.

Sincerely,

/s/ John T. Dempsey
JOHN T. DEMPSEY

attachment

PLAINTIFF-INTERVENOR EXHIBIT H

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Dr. John T. Dempsey
Director
Department of Social Services
300 South Capitol Avenue
P.O. Box 30037
Lansing, Michigan 48909

Dec. 15, 1980

Dear Dr. Dempsey:

I am responding to your May 29, 1980 letter in which you inquire as to whether a State may establish maximum deductions for work related expenses, including child care.

Placing arbitrary maximums on allowable work expenses is contrary to the Social Security Act (section 402(a)(7) and (8)) and the Supreme Court ruling in *Shea* v. *Vialnando*, 416, U.S. 251 (1974). Although standardized amounts for work expenses may be established by State agencies, the State must allow individualized expenses when an applicant or recipient can document that he or she has reasonable expenses related to employment that exceed that standard.

However, reimbursement for specific work expenses which exceed the State standard can be limited on a case by case basis using criteria such as the availability, suitability and prevailing costs of alternative services in the community.

I hope this information is helpful to you in resolving Michigan's child care issue.

Sincerely,

IRA GOLDSTEIN
Acting Associate Commissioner
for Family Assistance

cc: Regional Commissioner, Chicago

Goldstein	Henderson
Ohki	Central File
Kelly	SFY1/SSA/OFA/DPO/Henderson/deMaar
deMaar	rvw/8/18/80
Peiper	SFY1/SSA/OFA/DPO/Henderson/
	rvw/9/25/80
	Revised: rvw/9/29/80

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 80-71479

Hon. Robert E. DeMascio

[Title Omitted in Printing]

ORDER GRANTING INTERVENTION

At a session of said Court held
this 10th day of April, 1981, at
the Federal Court House.

PRESENT: The Honorable Robert E. DeMascio

The matter came on to be heard on Applicant Johnny Green's Motion to Intervene, briefs having been filed and oral arguments heard at a hearing held on March 30, 1981 and the Court being duly advised in the premises;

IT IS ORDERED that the Motion to Intervene is hereby granted, the proposed Intervenor Complaint attached to the Motion to Intervene shall be deemed filed, and Defendant shall have 20 days from the date of this order to file a responsive pleading.

IT IS FURTHER ORDERED that the caption of this suit shall be amended in conformity with this Order.

/s/ Robert E. DeMascio
HONORABLE ROBERT E. DEMASCIO
U.S. District Court Judge

Approved as to form:

/s/ Robert Rosenberg
ROBERT ROSENBERG (P23162)

/s/ Edward J. Hoort
EDWARD J. HOORT (P25561)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 80-71479

Hon. Robert E. DeMascio

[Title Omitted in Printing]

ORDER DENYING DISMISSAL

At a session of said Court held
this 10th day of April, 1981, at
the Federal Court House.

PRESENT: The Honorable Robert E. DeMascio

This matter having come on to be heard on Defendants Motion to Dismiss, and briefs having been filed and a oral argument heard on March 30, 1981 and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that, pursuant to the stipulation of the parties, Counts I and III of Plaintiffs Complaint are dismissed as to Gail Blessing only, as they are moot.

IT IS FURTHER ORDERED that as to all other respects, Defendants Motion to Dismiss is denied.

/s/ Robert E. DeMascio
HONORABLE ROBERT E. DEMASCIO
U.S. District Court Judge

Approved as to form:

/s/ Robert Rosenberg
ROBERT ROSENBERG (P23162)

/s/ Edward J. Hoort
EDWARD J. HOORT (P25561)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

New Case No. 80-60017
Old Case No. 80-71479

Hon. Charles W. Joiner

[Title Omitted in Printing]

DECLARATION OF JOHNNY GREEN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Johnny Green declares the following to be true:

1. I am the Plaintiff-Intervenor in the above-entitled case and I am submitting this declaration in support of the Motion for Summary Judgment.

2. In March, 1979, I was living in Ypsilanti, Michigan, with my son, Tyree, born October 27, 1977, and was a recipient of Aid to Dependent Children benefits (hereafter ADC), case number K8148787A, through the Washtenaw County Office of the Michigan Department of Social Services. My getting ADC was based on the fact that the father of my child was not in the home and was not otherwise supporting the child.

3. In March, 1979, I got a job through the Washtenaw County Employment and Training Program to work at Legal Services of Southeastern Michigan, Ann Arbor, Michigan. My pay there was approximately $333.00 (gross) every two weeks for which I worked 40 hours per week. I worked at Legal Services up until May 1, 1981 when the 18-month period of eligibility for public service employment expired.

4. Legal Services of Southeastern Michigan is located at 420 N. Fourth Avenue in Ann Arbor and was about 10 miles from my home in Ypsilanti. I drove my car to

work every day until it broke down. Then I took the bus which cost me about $7.50 per week.

5. Because of my job, I had to make arrangements for care of Tyree while I was at work. Adding the time for dropping him off and picking him up, I needed approximately 42.5 hours of child care per week.

6. I was told by my caseworker at the Department of Social Services (hereafter DSS or the Department) that I would be eligible to have the Department pay for child care while I worked but told me about the limits on the amount of payment.

7. For approximately the first year that I worked, I was able to place my child at centers that accepted the payment by DSS as full payment for the child care. Two of these centers were Little Country Schoolhouse and Sunshine Learning Center in Ypsilanti, both of which eventually closed.

8. Sunshine Learning Center closed in October of 1980 and I then had to find another place for my child while I was at work. I looked at a number of different places trying to find a center which was certified to receive DSS child care payments, but which would care for my child within the $35.00 per week maximum that would be paid by the Department. All the places I went to that accepted DSS payments for child care also charged the parent an additional amount to make up the difference between the DSS maximum payment and the actual full charge for the day care.

9. The place I finally decided to place my child at, Humpty-Dumpty Day Care Center, 1212 Washtenaw, Ypsilanti, Michigan, was no exception. Humpty-Dumpty accepted the maximum DSS payment of $35.00 per week and then charged me an additional $15.00 per week which I had to pay if I wanted to keep my child there. Because I had no other way to care for my child while at work and could not find any suitable care for any less, I had to agree to this arrangement. I placed Tyree there in

November, 1980 and paid $39.00 directly to Humpty-Dumpty for the month of November.

10. That same month, I learned from an attorney that the Department was required to allow working ADC recipients to deduct from their earned income the amount they paid for necessary child care. So, when I filled out my monthly income report for November, I claimed the $39.00 as a work expense deduction in addition to the other deductions I was already allowed.

11. My caseworker told me orally that my request for deduction of child care expenses would not be allowed because Department policy did not authorize any child care deductions. I asked her to put the denial in writing and received a letter shortly, dated December 19, 1980, which stated "[b]abysitting is not an allowable deduction of work expenses." A true copy of this letter is attached to this Declaration as Exhibit A (1 page). This is the only notice of the denial that I received.

12. After this, I continued to work, with Humpty-Dumpty taking care of my child while I was at work, and I continued to have to pay approximately $15.00 per week to Humpty-Dumpty over and above the amount Humpty-Dumpty received from the Department. This went on until May 2, 1981, when I was laid off at Legal Services of Southeastern Michigan because my public service employment eligibility expired.

13. The following is a true and accurate account of the dates and amounts which I paid to Humpty-Dumpty:

11/26/80	$ 39.00
12/12/80	45.00
1/15/81	50.00
2/17/81	50.00
3/16/81	83.00
3/26/81	46.00
4/15/81	30.00
5/ 7/81	31.00
	$374.00

Copies of receipts and money order stubs for the above payments are attached to this Declaration as Group Exhibit B (8 pp.) Some of the receipts reflect payment by me directly to Judy Gowley, owner-operator of Humpty-Dumpty. Some of them, however, indicate payment by Morrell Cooper to the Center. These are accompanied by a receipt indicating that I paid Morrell Cooper the money so he could pay Humpty-Dumpty for me.

14. At no time while I was working was I informed orally or in writing by any DSS employee that the expenses of child care could be allowed as a deduction. They never informed of my right to a hearing following denial of my request for the deduction in December, 1980.

15. I understand that the federal law on child care deductions for ADC recipients has changed effective October 1, 1981 and that ADC applicants or receipients are now allowed to claim child care deductions up to $160.00 per month per child. I wish to continue this lawsuit to get a determination by this Court that the old policy did not allow any child care deduction violated my rights under the federal law before October 1, 1981. In the event of such determination in my favor, I would then request a state administrative hearing to obtain the retroactive benefits to which I believe I am entitled. Also, if this Court decides the policy was illegal, I wish to have notices sent out to other ADC recipients who worked before October 1, 1981 telling them of the illegal policy and advising them about requesting hearings to determine if they were denied benefits and, if so, how much.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 26, 1982.

/s/ Johnny Green
JOHNNY GREEN
Plaintiff-Intervenor

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 80-60017

Hon. Charles W. Joiner

[Title Omitted in Printing]

ANSWER TO INTERVENOR COMPLAINT

NOW COMES Defendant John T. Dempsey, by and through Frank J. Kelley, Attorney General of the State of Michigan and the undersigned assistant attorney general, and answering Intervenor's Complaint for Declaratory, Injunctive and other Relief says as follows:

1. Defendant is not required to respond to Plaintiffs' legal conclusions and statements of intent contained in the preliminary statement, however, to the extent any facts are stated therein they are denied.

2. Defendant is not required to respond to Plaintiffs' statement of intent relative to the scope of his lawsuit.

3(a). Defendant denies that an actual controversy exists which gives rise to a cause of action for declaratory relief under 28 U.S.C. 2201 and 2202 or Fed. R. Civ. P. Rule 57.

3(b). Defendant denies that this action is authorized under 42 U.S.C. 1983 as the claims for relief asserted herein are moot.

4. Defendant denies that the subject matter jurisdiction of this Court has been properly invoked and in support of said denial affirmatively states that as this action has been rendered moot by the change in federal law this Court should dismiss this cause for lack of jurisdiction. (See Motion to Dismiss and Supporting brief filed January 29, 1982.)

5. Defendant denies that Intervenor-Plaintiff Johnnie Green is authorized to bring this action individually or on behalf of the alleged class for the reasons stated in this Court's Memorandum and Order of January 9, 1981 denying class certification and those further stated in Defendant's Motion to Dismiss filed January 29, 1982.

6. Defendant denies that the Fed. R. Civ. P. 23 prerequisites for class certification have been met by Intervenor-Plaintiff and in support of said denial assert the reasons set out in Defendant's brief in support of his motion to dismiss filed January 29, 1982 including the fact that Johnnie Green neither has claims typical of the class nor can she be an adequate representative. Furthermore the case has been moot since October 1, 1981.

7. Defendant denies that Intervenor-Plaintiff has requested a deduction from earned income in determination of her *current* ADC grant as Intervenor-Plaintiff has reported no earned income to the Wayne County Department of Social Services where she has been receiving ADC since January, 1982. In fact, the last time Intervenor-Plaintiff was on ADC was in August, 1981.

8. Defendant admits the allegations contained in paragraph 8.

9. Defendant admits the allegations contained in paragraph 9, to the extent the provisions of the Social Security Act and regulation is mandatory in nature and does not leave any discretion to the State. Further answering said paragraph, this Defendant affirmatively states that:

MCLA 400.10 designates the Michigan Department of Social Services as the state agency to cooperate with the federal government in the administration of the Social Security Act, Title VI. In compliance with 45 C.F.R. 201.2, as a condition to the receipt of Federal funds under Title IV, the Michigan Department of Social Services has submitted a *State Plan* for the administration of Title IV-A—Financial Assistance—Aid to Families with Dependent Children. The State Plan as submitted

to the Department of Health, Education and Welfare has been approved and certified as being in compliance with federal statutes and regulations, by the Department of Health, Education and Welfare.

10. Defendant denies the allegations contained in this paragraph as the Social Security Act, as amended by P.L. 97-35, the Omnibus Reconciliation Act, at 42 U.S.C. § 602(a)(7) does not contain such requirement. Further effective October 1, 1981, 42 U.S.C. § 602(a)(8) set maximum limitations on the amount of deductions from earned income for work related expenses and child care expenses.

11. Defendant denies the allegations contained in this paragraph as the cited regulations have been superceded by amended regulations also effective October 1, 1981, consistent with the amended 42 U.S.C. § 602(a)(8).

12. Defendant admits that his actions are and have been in conformity with 45 C.F.R. 206(a)(1)(i) and 206.10(a)(4) which are set out in their entirety below:

45 C.F.R. 206(a)(2)(i): "Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program and related services available and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins and pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity."

45 C.F.R. 206.10(a)(4): "Adequate notice shall be sent to applicants and recipients to indicate that assistance, including supplemental payments, has been authorized (including the amount of financial assistance) or that it has been denied or terminated. Under this requirement, adequate notice means a written notice that contains a statement that action taken, and the reasons for and specific regulations support such action, and an explanation of the individual's right to request a hearing."

Further answering said paragraph, this Defendant states that the regulations cited above delineate requirements for State plans under Title IV-A of the Social Security Act. It is the department's position that this requirement mandates that information be provided regarding components of the AFDC program and the rights and responsibilities of applicants and recipients in relation to those components.

This position is also derived in part from another provision of federal regulations (45 C.F.R. 205.10(a)(3)). This subsection obligates the department to provide written notice of a right to a hearing "at the time of application and at the time of any action affecting his claim." A claim for assistance is affected only by a proposed change or reduction in one or more of the standard allowances in the approved state plan.

45 C.F.R. 206.10(a)(7) states "In cases of proposed action to terminate, discontinue, suspend, or reduce assistance, the agency shall give timely and adequate notice. Such notice shall comply with the provisions of 205.10 of this chapter." Such actions are not proposed in relation to benefits not included as part of the approved State standard of assistance.

13. Defendant admits those allegations as are consistent with § 402(a)(1) of the Social Security Act and 46 C.F.R. § 205.120 (1979) and denies those that are inconsistent therewith.

14. Defendant denies that the allegations contained in this paragraph reflect the current policy of DSS as contained in Assistance Payments Manual Item 331 (revised effective October 1, 1981). Defendants attach that policy in response to the allegations contained herein.

15. Defendant admits that his Department administers the Title XX program in Michigan and denies that after October 1, 1981 day care benefits were paid under this program to employed recipients of ADC as expenses for day care, on and after said date, were allowed as an

earned income disregard for employed ADC recipients up to federally imposed maximums.

16. As Intervenor-Plaintiff has omitted a paragraph 16 in her Complaint, no answer is required.

17. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs. Further answering said paragraph, Defendant states that the Department is under no obligation to provide applicants for or recipients of assistance with a determination of eligibility for payment in excess of the state AFDC standards. All determinations for applicants and only negative case determinations for recipients, based on approved state standards, require notices of the proposed action and the right of a client to an administrative hearing. Therefore, as the method used by the Department in meeting day care costs of employed AFDC recipients was within the State's approved plan for Title XX prior to October 6, 1981 the AP worker was under no obligation to send notice to the recipient regarding non-payment of child care in excess of the Department's child care payment.

18. Defendant denies the allegations contained in paragraph 18 as any person deemed entitled to a child care deduction by an administrative law judge, after hearing, is determined to be so entitled in accordance with Department policy not in contravention thereof.

19. Defendant denies the allegations contained in paragraph 19 as Intervenor-Plaintiff Johnnie Green actually resides in Detroit, Michigan (not Ypsilanti). Further, her ADC case was closed, due to her receipt of excess income, on August 11, 1981 and was not opened again until January 1, 1982 due to absence from the home of her child's father.

20. Defendant admits that Ms. Green began working in Ann Arbor, Michigan in November, 1979 and was receiving $333.00 every two weeks. Defendant denies that she has continued to work in Ann Arbor up to the

present as she apparently left Ann Arbor in August, 1981 and DSS records in Wayne County where she presently resides show her to be unemployed.

21. Defendant denies that Intervenor-Plaintiff has incurred work related costs described in this paragraph since August, 1981 up to the date this answer is filed.

22. Defendant denies that Intervenor-Plaintiff has incurred child care expenses because of employment since August, 1981.

23. Defendant denies that day care is unavailable to Intervenor-Plaintiff, if it was required, at $35.00 per week in Detroit where she presently resides.

24. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained herein and leaves Intervenor-Plaintiff to her proofs except as to the receipt attached as Exhibit A which Defendant presumes at this time based on current information to be genuine.

25. Defendant admits the genuineness of the 12/19/80 handwritten letter of Ms. N. Drouillard to Ms. Green attached as Exhibit B to the Complaint and believes the copies of a receipt and money order to be genuine (Exhibits C & D). However, as to the remaining allegations made in said paragraph, Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity thereof. Further these facts, even if true, do not reflect Ms. Green's current circumstances.

26. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations made in this paragraph and leaves Intervenor-Plaintiff to her proofs.

27. Defendant denies the allegations made in this paragraph as same are untrue except that legal services *did* correspond with HEW (now HHS) and that the letters attached as Exhibits E and F to Intervenor's Complaint were received by Defendant and speak for themselves.

28. Defendant admits that his May 29, 1980 letter (Exhibit G) and Ira Goldstein's response dated December

15, 1980 are genuine copies. As such the documents speak for themselves.

29. Defendant denies violating 42 U.S.C. 602(a)(7) as it existed prior to October 1, 1981 and regulations promulgated thereunder. Further effective October 1, 1981 this claim has been mooted out by the amendments in P.L. 97-35 §§ 2301 and 2302 to 42 U.S.C. 602(a)(7) and 602(a)(8).

30. Defendant denies that its policies were prior to October 1, 1981 or are currently contrary to 45 C.F.R. § 206.10(a)(2)(i) and (a)(4), 45 C.F.R. § 205.10(2)(3) or the Due Process Clause of the U.S. Constitution, Amendment XIV.

31. Defendant denies that Assistance Payments Manual Item 331 when read in conjunction with Social Services policy as contained in the Services Manual are inconsistent with providing equal protection of the law as it is rational to classify those persons eligible for AFDC benefits based on actual need for same. Further, after October 1, 1981, the alleged classification complained of ceased to exist as all expenses of employment up to the federal maximum were allowed to be taken as an earned income disregard.

32. Defendant denies the allegations contained in this paragraph as they are untrue because DSS has always administered the AFDC program on a statewide basis with equitable standards of assistance and administration that are mandatory throughout the state.

33. Defendant denies that either Intervenor-Plaintiff or the class she seeks to represent are currently being harmed in any fashion which would require any relief from this Court.

WHEREFORE, Defendant prays that this Honorable Court:

A. Dismiss the above-captioned cause for lack of subject matter jurisdiction, or

B. Dismiss the claims of Intervenor-Plaintiff as they are moot, and

C. Again deny class certification in this matter, and

D. Deny any and all relief requested by Intervenor-Plaintiff both of a declaratory and injunctive nature as well as Intervenor-Plaintiff's claimed costs and attorneys.

E. Afford Defendant his costs, attorneys fees and such other or further relief as is just and equitable.

FRANK J. KELLEY
Attorney General

JANIS MEIJA
Assistant Attorney General

/s/ Robert N. Rosenberg
ROBERT N. ROSENBERG
Assistant Attorney General
512 Commerce Center
Lansing, Michigan 48913
Phone: (517) 373-7700

Dated: February 3, 1982
mp/27/mwora

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 80-60117

HON. CHARLES W. JOINER

[Title Omitted in Printing]

MEMORANDUM OPINION AND ORDER

Before the court are plaintiffs' motions for summary judgment and class certification, and defendant's motion to dismiss.

On April 11, 1980 plaintiffs, Michigan Welfare Rights Organization and Gail Belssing, filed a complaint seeking declaratory and injunctive relief against John Dempsey, the Director of the Michigan Department of Social Services (MDSS). By stipulation of the parties, the claims of the only individual defendant, Blessing, were rendered moot as to the key counts in the complaint. However, an intervening plaintiff, Johnny Green, filed her complaint on February 18, 1981, and intervention was granted on April 10, 1981. The intervenor's complaint asserted an additional basis for recover beyond those claimed in the original complaint.

Plaintiffs alleged that defendant was depriving them benefits to which they were entitled under Title IV-A of the Social Security Act (the Act), 42 U.S.C. §§ 601-615, in violation of 42 U.S.C. § 1983. *See also* 45 C.F.R. §§ 233.20(a)(6)(iv) and (7)(i). This alleged deprivation was asserted to be the result of defendant's wrongful refusal to deduct from plaintiffs' income the costs of child care necessitated by working mothers' need to be at their place of employment. Plaintiffs also alleged that

defendant failed to properly inform them of their rights to claim work expenses above the standard amount and of their right to request an administrative hearing to challenge defendant's denial of benefits. *See* 45 C.F.R. §§ 205.10(a)(3), 206.10(a)(2)(i) and (a)(4). Finally, plaintiffs claimed that defendant used disparate policies throughout the state and therefore violated the requirement that all state plans under the Act must operate on a statewide basis with equitable standards of assistance and administration that are mandatory throughout the state. *See* 42 U.S.C. §§ 602(a)(1) and (3), and 45 C.F.R. § 205.120.

The Act under scrutiny, commonly known as Aid to Families with Dependent Children (AFDC), is designed to assist needy families with children. The Act establishes an elaborate mechanism for state participation in the program. However, the process under inquiry herein, simply stated, requires the states first to apply federal guidelines to establish a family's need and then compare that need determination to the amount of income determined to be available to a family eligible for assistance under the program. The difference between the amount of need and the amount of available income provides the basis for establishing the amount of cash assistance to which the family will be entitled under the program. Of course, under this method of calculation the amount of income the family is deemed to earn is critical to the ultimate determination of the family's entitlement under the Act.

Both complaints sought recovery for the named plaintiffs and for those similarly situated.

Prior to October 1, 1981, federal law required a state participating in the program to deduct from income or "disregard" all family expenses reasonably attributable to the earning of income. 42 U.S.C. § 602(a)(7). This included child care expenses incurred by a mother when she went to work and paid someone to care for her children. *See also* 45 C.F.R. §§ 233.20(a)(6)(iv) and (7)(i).

Plaintiffs challenged defendant's alleged refusal to deduct from the family incomes of AFDC recipients and applicants the money paid by families for child care. Plaintiffs asserted that MDSS refused to permit child care costs to be considered as an allowable expense of employment in calculating budgetable earned income. Plaintiffs contended that MDSS's refusal to permit recipients to deduct child care costs from family income was based on the Department's erroneous position that it already provided day care services to recipients without cost. While plaintiffs conceded that MDSS had a program of child care service implemented under Title XX of the Social Security Act, 42 U.S.C. § 1397, they alleged, however, that there were significant impediments to AFDC recipients' use of the "free" day care facilities provided by the defendant.

I. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS

The legal issue presented to the court is quite narrow. Plaintiffs seek a finding by the court that defendant's refusal to deduct from AFDC's family incomes the costs of child care violated 42 U.S.C. § 602(a)(7). When plaintiffs filed their suit, 42 U.S.C. § 602(a)(7) provided:

> [E]xcept as may be otherwise provided in clause (8), [a state plan for aid and services to needy families with children must] provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . *as well as any expenses reasonably attributable to the earning of any such income*. . . . (Emphasis added).

See also 45 C.F.R. §§ 233.20(a)(6)(iv) and (7)(i).

Plaintiffs argue that proper application of the statute required defendant to deduct from the incomes of AFDC

families the reasonable costs of child care. As noted at the outset, there are several other arguments raised by plaintiffs for the proposition that defendant failed to follow the law. However, the principal issue raised by plaintiffs concerns defendant's application of § 602(a)(7).

On August 13, 1981, Congress passed the Omnibus Reconciliation Act, Pub.L. No. 97-35. Among other things, the Act modified the relevant provisions of the Social Security Act under scrutiny in this case. Effective October 1, 1981, 42 U.S.C. §§ 602(a)(8)(a)(ii) and (iii) were amended to provide that the state agency:

> (ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month);
>
> (iii) shall disregard from the earned income of any child, relative, or other individual specified in clause (ii), an amount equal to expenditutes for care in such month for a dependent child, or an incapacitated individual living in the same home as the dependent child, receiving aid to families with dependent children and requiring such care for such month, to the extent that such amount (for each such dependent child or incapacitated individual) does not exceed $160 (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month) . . . .

Because of these amendments to the Act and defendant's compliance with them, plaintiffs concede that their

claim for relief, if valid at all, relates only to benefits prior to October 1, 1981.

Defendant contends that the case should be dismissed as moot. It asserts that effective October 1, 1981 it changed its policies to be consistent with the amendments to the Act. Accordingly, defendant states that the Eleventh Amendment bars plaintiffs' recovery for retroactive benefits. On the other hand, plaintiffs present arguments to support their contention that defendant violated the pre-October, 1981 law and they assert that the case is not moot as to those pre-October, 1981 claims.

The court has carefully evaluated the motions, briefs, responses, and supplemental briefs of the parties. Since the court finds plaintiffs' claims are moot and barred by the Eleventh Amendment, it need not decide whether or not defendant's pre-October, 1981 interpretation of the Act violated the law as it then existed. None of the plaintiffs claim a right to prospective relief. There is no assertion that the defendant is presently violating the law with respect to child care expenses, and there is no claim that there has been a violation after October 1, 1981.

The court finds plaintiffs claims for pre-October, 1981 benefits are moot. The Eleventh Amendment bars plaintiffs from recovering the relief they seek. Application of the Eleventh Amendment requires the court to dismiss the lawsuit since plaintiffs seek retrospective money damages.

Five years after the Supreme Court's decision in *Chisholm v. Georgia*, 2 Dall. 419 (1793), in which a state was held liable to suit by a citizen of another state or a foreign country, the Eleventh Amendment was adopted and has remained unchanged. It provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The clear intent of the amendment was to reduce jurisdiction and power of federal courts over the states and to smooth the relations between the states and the federal government. Since its passage, the Eleventh Amendment has been applied by courts to hold unconsenting states immune from suits brought in federal courts by citizens. Evolution of the rule has led courts to bar lawsuits by private parties where the liability sought to be established would lead to a pay out from the public treasury. *Edelman v. Jordan*, 415 U.S. 651 (1974).

In a narrow, circumscribed yet important modification of prior Eleventh Amendment analysis, the Supreme Court in *Ex Parte Young*, 209 U.S. 123 (1908), held that the Eleventh Amendment did not bar prospective injunctive relief. In subsequent cases, the Court sanctioned prospective relief even where such relief had an ancillary effect on the state treasury. *See Graham v. Richardson*, 403 U.S. 365 (1971) and *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, in each instance the monetary impact upon the state was merely incidental to prospective relief.

In contrast to *Ex Parte Young* and its progeny, plaintiffs here seek to have the court award relief which is purely retrospective in nature and which is not incidental or ancillary to any prospective relief. Plaintiffs ask the court to grant them something which they are barred from recovering under the Eleventh Amendment. While plaintiffs couch their request for relief in terms of *Quern* type notice relief, the court finds that the request is not ancillary to any valid, awardable prospective relief.

An examination of the well reasoned, relevant trial and appellate cases that have interpreted the impact of *Ex Parte Young* on the Eleventh Amendment, and an application of all of the Supreme Court cases that have undertaken such an analysis, dictates that before this court can award plaintiffs what they seek there must be an award of prospective relief in their favor. Because the Eleventh Amendment forecloses the plaintiffs from an award of money damages as retrospective relief and because by

their own admission they are not entitled to prospective relief, the court finds it is precluded from taking the steps sought by plaintiff to impose monetary retrospective relief. *Quern v. Jordan*, 440 U.S. 332 (1979).

Accordingly, plaintiffs' motion for summary judgment is denied and defendant's motion to dismiss is granted.

II. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

In view of the court's ruling on plaintiffs' motion for summary judgment and defendant's motion to dismiss, plaintiffs' motion for class certification is moot and is, therefore, denied.

/s/ Charles W. Joiner
CHARLES W. JOINER
United States District Judge

Dated: June 22, 1982
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 80-60117

HON. CHARLES W. JOINER

[Title Omitted in Printing]

JUDGMENT

The plaintiffs motions for summary judgment and class certification, and defendant's motion to dismiss came on for hearing before the court, Honorable Charles W. Joiner presiding, and the issues having been duly heard and a decision having been duly rendered in a Memorandum Opinion and Order dated June 22, 1982,

It is Ordered and Adjudged that the plaintiffs take nothing, and that the action be dismiss on the merits, with prejudice.

ROBERT A. MOSSING

/s/ Sharon M. Bailey
Clerk of the Court

CWJ

Dated: June 22, 1982
Ann Arbor, Michigan

III. ORAL ARGUMENT TRANSCRIPT REFERENCES

STEPPARENT CARE TRANSCRIPT (4/13/82)

* * * *

[17] So, it's quite clear, even as late as September 21st, 1981, when those regulations came out and the final version came out in January and repeated that statement, that in the view of HHS, the defendant has not had, at any point, law of general applicability sufficient to base an assumption of income on, and, of course, that is the precise issue in this case, whether or not the State law which allegedly required support is one which is of general applicability which is co-extensive with that required of natural parents.

On the matter or relief, plaintiffs would point out that from the very beginning in their complaint, and I am referring to Paragraphs C, D and E in the relief section, Paragraph C, plaintiff requested declaratory judgment, saying that defendant's policy implemented in March is illegal, and in Paragraph D, we asked for an injunction against the enforcement of that policy, and in Paragraph E, we asked for notice relief.

So, from the very beginning, we've asked for the kind of relief we've requested here. Of [18] course, injunctive relief is no longer possible and, of course, plaintiffs can possibly stipulate to the modification of the preliminary injunction, indicating that no prospective injunctive relief would be necessary and that, of course, the injunction which had been entered, should have no prospective effect after October 1st.

As to the other kind of relief, declaratory relief and notice relief, this is the classic example of a case as the Supreme Court indicated in the Camenisch v. University of Texas case, cited in our brief, where some kinds of relief are moot, and other kinds of relief are not moot, and it's plaintiffs' position the declaratory relief requested

in the complaint and notice relief requested in the complaint are not moot at this point.

As to declaratory relief, it's quite clear that for all plaintiffs, all the plaintiffs class, not just the ones that have lost benefits, but the ones that can obtain benefits because they were covered by the preliminary injunction, that this case is not moot.

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CHILD CARE CASE TRANSCRIPT (3/9/82)

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[12] Basically, there are three claims. One is that the failure to allow that benefit, those deductions, violated the Social Security Act; the second claim being that failure to notify the recipient of ADC to be informed of their rights to claim actual work expenses as set forth by Reimer v. Hooker, cited in the brief and third being, defendant set up a system of dual policy whereby the deduction was allowed for persons, certain persons who asked for administrative hearings; was not allowed for other persons who asked for administrative hearings and was not allowed to persons that just came into the office and did not appeal the determination.

It's the claim of the plaintiffs, essentially, the defendant, acting under color of State law, had deprived plaintiffs and the class of federal rights.

THE COURT: What do you want me to do?

MR. BURNHAM: I would ask you to enter summary judgment in favor of the plaintiff Johnny Green and the class which has been proposed.

THE COURT: And what happens, then, if I did that?

[13] MR. BURNHAM: At that point, then, we will also ask that the Court provide the order—order the notices which was allowed in Quern v. Jordan be provided to members of the class; that they might—

THE COURT: But there was a difference in that case, wasn't there? Well I don't care to press that now, but that's the only relief you want?

MR. BURNHAM: At this point, yes, your Honor. In other words, declaratory relief that in fact the practices and policies violated Federal law and a declaratory judgment for Johnny Green, individually, who is the current plaintiff intervenor, who has—

THE COURT: What would she get?

MR. BURNHAM: She would $374.00 by going to the administrative hearing which would be retroactive benefits—

THE COURT: Who are the members of the class?

MR. BURNHAM: All persons who had work expense during the time period defendant had a policy which was in violation of Section 602(a)(7), who was not allowed to deduct child care expense because of the illegal policy up to October 1st when [14] the Act became law.

THE COURT: Is there a limitation period?

MR. BURNHAM: The latest period October 1, 1981. In terms of the earlier limitation period, it's not clear to me exactly when the defendant's policy changed. On many of these issues, the defendant's policy never said, one way or the other, whether or not benefit—whether or not child care deductions were allowed. That was read by some administrative law judges one way and read by others a different way. To the extent anyone was not allowed to deduct benefit—child care expense then they should be be allowed to file an administrative claim.

THE COURT: There have been a number of policy changes is the problem.

How far back do we go?

MR. BURNHAM: I would say until—since the Supreme Court's decision, Shea v. Vialpando, in 1974 when it became clear States had to allow actual work expense deductions.

MR. BURNHAM: Since that time, it's become crystal clear what defendant has done violates Federal law.

IV. STATE RULES & REGULATIONS

MICHIGAN ADMINISTRATIVE CODE

R 400.902 Notice of negative action.

Rule 902. (1) In cases of proposed action to discontinue, terminate, suspend, or reduce public assistance or services, the department shall mail a timely notice before a proposed change would be effective. Timely means that the notice is mailed at least 10 days before the action would become effective. A notice shall include the following:

(a) A statement of what action the department intends to take.

(b) The reasons for the intended action.

(c) The specific regulations supporting the action.

(d) An explanation of the individual's right to request a hearing.

(e) The circumstances under which assistance or service is continued if a hearing is requested.

(2) An agency may dispense with timely notice as provided in subrule (1), but shall send adequate notice as detailed in subrule (1) not later than the date upon which the action would become effective, when:

(a) An agency has factual information confirming the death of a recipient or of the aid to dependent children payee when there is no relative available to serve as new payee.

(b) An agency receives a clear written statement signed by a recipient that he no longer wishes assistance, or that gives information which requires termination or reduction of assistance, and the recipient has indicated, in writing, that he understands that this shall be the consequence of supplying such information.

(c) A recipient has been admitted or committed to an institution, and further payments to that individual do

not qualify for federal financial participation under the state plan.

(d) A recipient has been placed in skilled nursing care, intermediate care, or long-term hospitalization.

(e) A recipient's whereabouts are unknown and agency mail directed to him has been returned by the post office, indicating no known forwarding address. A recipient's check shall be made available to him if his whereabouts become known during the payment period covered by a returned check.

(f) A recipient has been accepted for assistance in a new jurisdiction and that fact has been established by the state department.

(g) An aid to dependent children child is removed from the home as a result of a judicial determination.

(h) A change in level of medical care under the medical assistance program is prescribed by the recipient patient's physician.

(i) A special allowance granted for a specific period is terminated and the recipient has been informed in writing at the time of initiation that the allowance automatically terminates at the end of the specified period.

(3) When the changes in either state or federal law require automatic grant adjustments for classes of recipients, timely notice of the grant adjustments shall be given which is adequate if it includes a statement of the intended action, the reasons for the intended action, a statement of the specific change in law requiring the action, and a statement of the circumstances under which a hearing may be obtained and assistance continued.

R 400.903 Right to hearing.

Rule 903. (1) An opportunity for a hearing shall be granted to an applicant who requests a hearing because his claim for assistance is denied or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by an agency action resulting in suspension, reduction, discontinuance, or termination of assistance.

(2) An opportunity for a hearing shall be granted to an applicant who requests a hearing because of a denial, suspension, or exclusion from a service program or failure to take into account a recipient's choice of service.

(3) A hearing shall not be granted when either state or federal law requires automatic adjustments for classes of recipients, unless the reason for an individual appeal is incorrect grant computation.

(4) An applicant for, or holder of, a license issued by the department is entitled to a hearing based upon the denial, limitation, refusal to renew, or revocation of a license.

(5) A complaint as to alleged misconduct or mistreatment by a state employee shall not be considered through the administrative hearing process, but shall be referred to the department personnel director.

R 400.904. Request for hearing; timeliness.

Rule 904. (1) A request for a hearing shall be in writing and signed by the claimant, petitioner, or on his behalf by his authorized representative.

(2) The request may be filed with the state department office in Lansing or a local county office. When filed with the local county department office, it shall be forwarded immediately to the state department office.

(3) Freedom to make a request for a hearing shall not be limited or interfered with in any way. The agency shall assist a claimant to submit and process his request.

(4) A claimant shall be provided 90 days from the mailing of the notice in R 400.902 to request a hearing.

(5) When a claimant requests a hearing within the timely notice period, assistance shall not be suspended, reduced, discontinued, or terminated until a decision is rendered after a hearing, unless:

(a) A determination is made at the hearing by the administrative law judge that the sole issue is one of state or federal law or policy. The administrative law judge shall inform a claimant promptly in writing that

assistance is to be discontinued pending the final decision if the sole issue is one of state or federal law or policy, subject to this issue being reconsidered in the final decision.

(b) A subsequent change affecting a recipient's grant occurs while the hearing decision is pending and a recipent fails to request a hearing after notice of the subsequent change.

(6) When an appeal is filed from a written notice of revocation, denial, or refusal to renew a license within 30 days of receipt of the written notice, the denial, revocation, or refusal or review shall be held in abeyance pending the final decision.

R 400.918 Retroactivity.

Rule 918. When a hearing decision is favorable to the claimant, or when the department decides in favor of the claimant prior to a hearing, the department shall make corrective retroactive payments promptly in accord with federal regulations.

V. THE SIXTH CIRCUIT'S ORDERS
COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-1546

CAROL BANAS, ET AL., PLAINTIFFS-APPELLANTS

vs.

JOHN T. DEMPSEY, DEFENDANT-APPELLEE

MICHIGAN WELFARE RIGHTS ORGANIZATION, ET AL.,
PLAINTIFFS-APPELLANTS

vs.

JOHN T. DEMPSEY, DEFENDANT-APPELLEE

On Appeal from the United States District Court
for the Eastern District of Michigan

Decided and Filed August 22, 1984

Before: LIVELY, Chief Judge; JONES, Circuit Judge;
HOLSCHUH, District Judge.*

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* The Honorable John D. Holschuh, Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

HOLSCHUH, District Judge. In *Quern* v. *Jordan*, 440 U.S. 332 (1979), the Supreme Court held, in a case in which the District Court had enjoined state officials from future violations of federal law under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), that the Eleventh Amendment did not bar the additional relief of an order compelling the state officials to send notices to members of the plaintiff class of welfare recipients informing them of the availability of state administrative procedures to determine their eligibility for lost benefits. This appeal, a consolidation of two actions brought in the Eastern District of Michigan, presents questions involving the doctrine of mootness and, of more significance, the problem of under what circumstances a federal court can order a state official to give a *Quern*-type notice without violating the restrictions placed on Article III jurisdiction by the Eleventh Amendment.[1]

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[1] Plaintiffs in both cases seek remedies primarily under the civil rights statute, 42 U.S.C. § 1983, and the declaratory judgment statutes, 28 U.S.C. §§ 2201-02. Plaintiffs allege jurisdiction of the federal court under both 28 U.S.C. § 1343(3) and 28 U.S.C. § 1331. Although the parties have not questioned the jurisdiction of the federal court, we note that in *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600 (1979), the Supreme Court held that 28 U.S.C. § 1343 does not provide subject-matter jurisdiction to hear a case based solely on a claim that state law conflicts with the Social Security Act, because an alleged violation of the Supremacy Clause "does not, in itself, give rise to a claim 'secured by the Constitution' within the meaning of § 1343(3)," 441 U.S. at 615, and the Social Security Act is not a statute providing for "equal rights" within the meaning of § 1343(3) or "civil rights" within the meaning of 1343(4). 441 U.S. at 617-18.

In the present cases, however, the plaintiffs, in addition to the alleged violations of the Supremacy Clause, the statutory claims, also allege not "wholly insubstantial" federal constitutional (equal protection or due process) claims, which could support the court's exercise of pendent jurisdiction over the statutory claims under 28 U.S.C. § 1343, *Hagans* v. *Lavine*, 415 U.S. 528 (1974), apart from plaintiffs' claim of jurisdiction under 28 U.S.C. § 1331.

I.

Although both cases have given rise to the same important issues, the factual history of each case warrants separate discussion.

A.

Plaintiffs, Michigan Welfare Rights Organization (MWRO) and Gail Blessing, filed a class action complaint on April 11, 1980, seeking relief primarily under 42 U.S.C. § 1983, and challenging certain policies of defendant, the Director of the Michigan Department of Social Services (MDSS), relating to the provision of day care benefits for employed Aid to Families with Dependent Children (AFDC) recipients.

Plaintiffs alleged in count I of their complaint that by wrongfully refusing to deduct from plaintiffs' incomes child care costs necessitated by working parents' needs to be at their places of employment, defendant was depriving them of benefits to which they were entitled under Title IV-A of the Social Security Act in violation of the Supremacy Clause. In count II, plaintiffs asserted that in failing to inform them properly of their rights to claim work expenses above the standard amount and of their right to request an administrative hearing to challenge defendant's denial of benefits, defendant was violating not only federal regulations but also the due process clause of the Fourteenth Amendment. Plaintiffs' third claim for relief alleged a denial of equal protection as a result of the acts alleged in count I.

Plaintiffs sought class certification, a declaratory judgment that defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged practices, notification to all class members of their rights to an administrative review under state procedures for lost benefits, and attorney's fees.

Prior to October 1, 1981, federal law required a state participating in AFDC to disregard from earned income

any expenses reasonably atributable to the earning of such income. This included child care expenses incurred by working parents. Plaintiffs asserted that defendant refused to permit child care costs to be considered as an allowable expense of employment in calculating budgetable earned income. Defendant contended that the state could do so because it already provided day care services to recipients without cost.

Effective October 1, 1981, Congress amended the relevant portion of the Social Security Act, 42 U.S.C. § 602 (a), to provide that the state agency shall disregard from earned income expenditures, not exceeding specified amounts, required to be incurred for care of a dependent child,[2] and defendant implemented policies, also effective October 1, 1981, consistent with these amended provisions. On January 29, 1982, plaintiffs moved for summary judgment on the merits of their claim that defendant's prior policies violated pre-October 1, 1981, federal law. They also sought an order against defendant state official requiring the issuance of a notice similar in content to that approved by the Supreme Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979). Defendant, on February 1, 1982, moved to dismiss the action, arguing that the federal law change had rendered the pre-October 1, 1981, claims moot and that the Eleventh Amendment barred any other relief, including an order requiring issuance of a *Quern*-type notice to persons who had lost benefits as a result of defendant's actions.

At the March 9, 1982, hearing on plaintiffs' motions for summary judgment and class certification and defendant's motion to dismiss, plaintiffs made no claim that state law violated the Social Security Act's child care expense provisions after October 1, 1981. Plaintiff's counsel admitted, on the record that plaintiff's claims for declaratory and notice relief, if valid at all, related only to benefits allegedly lost prior to October 1, 1981.

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[2] *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357-933 (1981).

The District Court on June 22, 1982, denied plaintiffs' motions for summary judgment and class certification and granted defendant's motion to dismiss the action. It is from these rulings that plaintiffs in *MWRO* appealed.

B.

On May 11, 1981, Carol Banas and eight other named plaintiffs filed a class action complaint, seeking relief primarily under 42 U.S.C. § 1983, and challenging in count I of their complaint the constitutionality of a section of the Michigan Poor Law, which, along with policies of the defendant Director of the MDSS, required that income of stepparents be considered in determining AFDC eligibility or grant levels for stepchildren under the age of 18 who lived in the same household as the stepparent. Plaintiffs claimed the statute and policies violated the applicable provision of Title IV-A of the Social Security Act and regulations pursuant thereto.

Plaintiffs asserted in count II an equal protection violation as a result of a section of the Michigan Poor Law that allegedly required stepparents to take on a greater responsibility for support of stepchildren eligible for AFDC benefits than was required of stepparents of stepchildren who were not eligible for AFDC benefits. In count III plaintiffs alleged that the Michigan Poor Law impermissibly burdened plaintiff's rights of family privacy and free association by encouraging stepparents to move out of the home or get a divorce if they were already married and by encouraging prospective stepparents not to marry.

Plaintiffs contended in count IV that defendant's policies permitted dependent children and their caretaker relatives, except for stepparents, to deduct from gross earned income all actual expenses of producing that income. State regulations were alleged to require eighty percent of the gross earnings of a stepparent to be automatically counted as available income without allowing for any work expense deductions. Plaintiffs asserted that

this distinction between the incomes of stepparents and other caretaker relatives violated the Social Security Act and federal equal protection guarantees.

Plaintiffs sought class certification, a declaratory judgment that the state statute and defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged law and practices, notification to all class members of their rights to an administrative review under state procedures for lost benefits, and attorney's fees.

On May 28, 1981, plaintiffs filed a motion for a preliminary injunction, seeking to enjoin defendant from enforcing the challenged policies and practices regarding stepparents' incomes. The District Court granted plaintiff's motion for a preliminary injunction, which ruling was then appealed to this Court.

Effective October 1, 1981, and before the appeal from the District Court's preliminary injunction could be heard, Congress amended the relevant portion of the Social Security Act, 42 U.S.C. § 602(a), to provide that income of stepparents living in the same household as the child shall be counted for the purposes of determining eligibility and amount of benefits for AFDC.[3] As a result of this change in the law, the parties stipulated to amend the preliminary injunction order, making its prospective effect valid only up to October 1, 1981. The District Court amended the preliminary injunction order to comport with the parties' stipulation, and on October 27, 1981, defendant voluntarily dismissed his appeal of the preliminary injunction order.

Defendant, on March 19, 1982, filed a motion to dismiss the action, arguing that plaintiffs' action was mooted by the amendment to the Social Security Act and that the Eleventh Amendment was a bar to the issuance of any orders sought by plaintiffs. Plaintiffs on April 9,

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[3] *See supra* note 2.

1982, filed their motion for summary judgment, seeking a declaration that the defendant's pre-October 1, 1981, policies violated the Social Security Act's requirements before that date and an order compelling the issuance of a notice similar in content to that approved by the Supreme Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979).

At the hearing conducted on April 13, 1982, plaintiffs admitted that the change in federal law mooted their claims for injunctive relief after October 1, 1981. Nevertheless, plaintiffs did not abandon their motions for class certification and summary judgment.

On June 22, 1982, the District Court issued its Memorandum Opinion and Order denying plaintiffs' motions for summary judgment and class certification and granting defendant's motion to dismiss the action. Plaintiffs appealed this decision jointly with the decision in the *MWRO* case.

II.

The District Court relied on both the mootness doctrine and the Eleventh Amendment in granting defendant's motions to dismiss both the *MWRO* case and the *Banas* case. The District Court concluded that the October 1, 1981, amendments to the Social Security Act rendered plaintiffs' claims moot. Although the District Court did not develop its reasoning concerning the Article III "case or controversy" requirement, it apparently relied upon plaintiffs' admissions that they were not claiming any violation of federal law by defendant after October 1, 1981.

With respect to the request for an order directing the sending of a notice to persons who had lost benefits as a result of defendant's actions, the type of notice discussed in *Quern* v. *Jordan*, 440 U.S. 332 (1979), the District Court concluded that the notice relief authorized by the Supreme Court in *Quern* had to be ancillary to prospective relief already granted. Finding that "plaintiffs have not obtained and could not obtain any prospective relief

upon which to base an ancillary order requiring *Quern* type notice," the District Court held that the Eleventh Amendment barred any order requiring notice to the putative classes in these cases. Finally, the District Court, in light of these rulings, denied the class certification motions as moot.

III.

The threshold issue presented by these consolidated appeals is whether the change in the law effective October 1, 1981, rendered plaintiffs' actions entirely moot. The mootness doctrine, one facet of the case-or-controversy requirement of Article III, has two separate components. A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest ['personal stake'] in the outcome." *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 396 (1980), (quoting *Powell* v. *McCormick*, 395 U.S. 486, 496 (1969)).

The primary relief sought by plaintiffs in both cases was an injunction to prevent the defendant Director of the Michigan Department of Social Services from enforcing state practices that allegedly were in violation of plaintiffs' rights under the Fourteenth Amendment and in violation of the Supremacy Clause of the Constitution. It is clear, and plaintiffs' counsel admitted, that the change in federal law that occurred while these actions were pending rendered plaintiffs' requests for such injunctive relief moot.[4] As noted earlier, the parties stipulated to amend the preliminary injunction in *Banas*,

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[4] "Of course, injunctive relief is no longer possible and, of course, plaintiffs can possibly stipulate to the modification of the preliminary injunction, indicating that no prospective injunctive relief would be necessary and that, of course, the injunction which had been entered, [in *Banas*] should have no prospective effect after October 1st." Transcript of hearing held in the District Court April 13, 1982, (Joint Appendix at 190-91).

and it was amended by the court so that it "should have no prospective effect on and after October 1, 1981."[5] Inasmuch as plaintiffs did not contend that defendant's post-October 1, 1981, practices violated any rights of plaintiffs, or that enforcement of defendant's previous policies was "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), a controversy no longer existed regarding defendant's conduct that would have permitted the granting of a *Young* injunction to force the state official to comply with federal constitutional and statutory law.

However, even though plaintiffs' primary claim for relief—an injunction to restrain conduct in violation of federal law—had become moot, it does not necessarily follow that there was no longer a case or controversy sufficient to support federal court jurisdiction under Article III of the Constitution. If, for example, plaintiffs, in addition to their claim for prospective injunctive relief, could also have asserted a claim for damages or restitution as a result of being deprived of welfare benefits, it is clear that such a claim would have saved their actions from the bar of mootness. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978); *Powell* v. *McCormack*, 395 U.S. 486 (1969); *McKenna* v. *Peekskill Housing Authority*, 647 F.2d 332 (2d Cir. 1981). In apparent recognition that a claim of this nature in the present case would have been barred by the Eleventh Amendment, *Edelman* v. *Jordan*, 415 U.S. 651 (1974), plaintiffs made no such claim. Instead, they sought an order directing defendant to send a *Quern*-type notice to members of the putative classes and, as the predicate for such an order, a declaratory judgment that defendant's prior conduct violated federal law.

Assuming, for the purpose of resolving the threshold question of mootness, that a declaratory judgment could have been the predicate for the issuance of further relief

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[5] Order Amending Preliminary Injunction, Joint Appendix at 46.

in the form of a *Quern*-type order, it seems clear that, with respect to members of the putative class in *MWRO* who lost benefits as a result of defendant's conduct, the issues of whether the District Court should have certified the class, rendered a declaratory judgment that defendant's past conduct in denying plaintiffs' benefits was violative of federal law, and ordered the service of a *Quern*-type notice advising members of the putative class of possible claims under the state's administrative procedure statutes for the recovery of those benefits remained "live." Those who lost benefits to which they allegedly were entitled also had an interest in obtaining a resolution of that issue sufficient to satisfy the "personal stake" requirement.

The *Banas* case presents a more difficult question of whether there was any longer a "case of actual controversy" [6] in view of the fact that the named plaintiffs and many members of that putative class received, as a result of the litigation, the benefits to which they claimed entitlement.[7] The *Banas* plaintiffs who received their benefits nevertheless contend that the issue of whether defendant's past conduct violated federal law was still "live" as to them, and that they and members of the putative class who received the benefits still had a "personal stake" in the outcome, because it was conceivable that defendant would still try to recoup, as overpayments, the benefits paid.[8] Defendant responds by pointing out

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[6] An essential requirement for the ordering of a declaratory judgment, consistent with the jurisdictional requirement of Article III, is that there be "a case of actual controversy." 28 U.S.C. § 2201.

[7] Apparently, many of the persons in *Banas* who received benefits pursuant to the preliminary injunction also were provided voluntarily by defendant retroactive benefits for the period during which benefits had been lost prior to the preliminary injunction.

[8] The *Banas* plaintiffs concede that "[n]otice relief of the type contemplated for plaintiffs who lost benefits would mean little to the group who got benefits." It is argued, nonetheless, that a "different form of notice might still be appropriate," one that would simply

that he not only has never sought to recoup any such benefits but has expressly waived any right to do so. Defendant further contends that, legally, he could not recoup benefits paid under an injunction, even if it were later determined that the injunction had been improvidently granted.

In our view, plaintiffs' assertion that defendant, contrary to his express representations and in light of his stipulation and dismissal of the appeal from the preliminary injunction, would attempt to recoup any benefits paid to the *Banas* plaintiffs or putative class members is purely conjectural. Accordingly, we conclude that, if all named plaintiffs and all putative class members had received benefits owed, there no longer would have remained in the *Banas* case "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). In such a case, having received the benefits to which they claimed to be entitled after filing their lawsuit, the *Banas* plaintiffs would have been under no threat of further injury as a result of defendant's conduct, *cf. Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982), and, therefore would have lacked that "personal stake in the outcome" required to assure the concrete adverseness necessary for the resolution of constitutional questions. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

The record, however, seems clear that not all members of the putative class in *Banas* did in fact receive all the benefits lost as a result of defendant's conduct allegedly in violation of federal law. It appears that during the period from the effective date of defendant's policies, March 1, 1981, to the date the preliminary injunction be-

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inform them that their entitlement to the benefits received under the preliminary injunction had been adjudicated by the federal court, "so that they would know to protest any attempt at recoupment."

came effective, June 1, 1981, some members of the putative class lost benefits as a result of those policies. To the extent that there remained putative class members who allegedly had lost benefits and had not yet been reimbursed, the *Banas* case could not have been considered moot, even though the named plaintiffs themselves no longer had a personal stake in the receipt of any lost benefits. *See United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980).[9]

Because we conclude that the complaints in *Banas* and *MWRO* should not have been dismissed, even after the change in federal law effective October 1, 1981, on mootness grounds, we are compelled to reach the Eleventh Amendment issue. Although the existence of the required case or controversy would have enabled the District Court to exercise its jurisdiction under Article III, the exercise of the judicial power conferred by Article III is clearly restricted, in actions brought against state officials, by the Eleventh Amendment.

IV.

The Eleventh Amendment provides, as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

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[9] The Federal Declaratory Judgment Act by its express language makes it clear that a court has certain discretion to grant or withhold declaratory relief. It provides, in pertinent part, that in "a case of actual controversy within its jurisdiction, . . . any court of the United States . . . *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201 (emphasis added). Decisions of the Supreme Court have established the discretionary nature of this remedy. *Zemel* v. *Rusk*, 381 U.S. 1, 19 (1965); *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324 (1961); *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 241 (1952). In the present cases, the District Court dismissed the actions on jurisdictional grounds and not as a result of exercising any discretion in the withholding of declaratory relief.

> commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Despite the limited language of the Amendment, the immunity it provides to the states was extended at an early date to suits brought by a citizen against his or her own state, *Hans* v. *Louisiana*, 134 U.S. 1 (1890), on the reasoning that the Amendment exemplified the broader doctrine of sovereign immunity of the states and that such immunity is a constitutional limitation on the federal judicial power established in Article III of the Constitution. *Pennhurst State School & Hospital* v. *Halderman*, —— U.S. ——, ——, 104 S. Ct. 900, 906, 79 L. Ed. 2d 67, 77 (1984). The jurisdictional bar prevents federal court actions, in the absence of consent, against a state or one of its agencies or departments, *Florida Department of Health* v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); *Alabama* v. *Pugh*, 438 U.S. 781 (1978), and suits against state officials when the state is "the real substantial party in interest," *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945), regardless of the nature of the relief sought. *Cory* v. *White*, 457 U.S. 85, 91 (1982).

The present cases, brought against defendant in his official capacity as Director of the Michigan Department of Social Services, are effectively actions against the state, and would clearly be barred by the Eleventh Amendment but for the saving grace of *Ex parte Young*, 209 U.S. 123 (1908).[10] Because *Young* created an "ex-

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[10] The Eleventh Amendment does not bar actions for money damages arising from constitutional torts committed by state officials who are then sued in their individual capacities in federal court. Such actions, seeking to impose personal liability on the individual defendants, are not considered to be actions against the state. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). In the cases on appeal, although brought against defendant "individually and in his official capacity as Director of Michigan Department of Social Services," it is clear that the only claims asserted against him are in his offi-

ception" to the sovereign immunity bar to actions against the state, permitting the present actions to be filed, it is the rationale of the *Young* doctrine that provides the basis for determining the type of relief that can now be granted in these cases. This requires a brief review of that landmark decision and the later narrowing of its reach by subsequent decisions of the Supreme Court.

A.

In *Young*, the Court held that the Eleventh Amendment does not bar an action in federal court to enjoin a state official from enforcing a state statute that allegedly violates the Fourteenth Amendment. In what the Court has since recognized as a "fiction," [11] the *Young* Court held that an unconstitutional enactment is "void" and thereby does not "impart to the state official any immunity from responsibility to the supreme authority of the United States." *Young*, 209 U S. at 160. Because the state could not authorize an unconstitutional action, the state official was "stripped of his official or representative character and [was] subjected to the consequences of his official conduct." *Id.*[12] If the state official were truly stripped of his official or representative character and subjected to the consequences of his official conduct, then no limitation would exist on the type of relief that could be granted. The Court, however, has never so held.

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cial capacity as the state official charged with enforcement of state law and policies allegedly in violation of federal law, and the only relief sought is declaratory, injunctive and notice relief.

[11] *Pennhurst State School & Hosp.* v. *Halderman*, —— U.S. at ——, 104 S. Ct. at 911, 79 L. Ed. 2d at 82.

[12] The "well-recognized irony" of *Young* is that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not state action under the Eleventh Amendment. *Florida Department of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) (Stevens, J., plurality opinion).

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), plaintiff filed a class action seeking declaratory and injunctive relief against state officials who were administering the federal-state programs of Aid to the Aged, Blind, or Disabled in a manner inconsistent with various federal regulations and with the Fourteenth Amendment. The District Court granted a permanent injunction requiring the state officials to comply with the federal law and also ordered the state officials to pay benefits that had been wrongfully withheld. The Supreme Court agreed that *Young* permitted "that part of the District Court's judgment that prospectively enjoined [the state officials] from failing to process applications within the time limits established by the federal regulations," *id.* at 664, but the Court held that *Young* did not permit the awarding of retroactive benefits, even if characterized as equitable restitution.

Edelman made it clear that the type of relief that can be granted under the *Young* exception to the Eleventh Amendment is limited. It noted that "[t]he relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment." *Id.* at 664. *Young*, therefore, clearly permits injunctive relief to compel state officials to comply with federal law, even if the cost of that future compliance requires the expenditure of money by the state. The "ancillary effect" on the state treasury in such cases is simply the consequence of state officials being forced to comply with federal law under a *Young* injunction. *Id.* at 668. The Court set forth its position as follows:

> Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to *prospective injunctive relief*, *Ex parte*, *Young*, *supra*, and may not include

> a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury, supra.*

Id. at 677 (emphasis added).

As the Court later pointed out in *Milliken* v. *Bradley*, 433 U.S. 267 (1977), *Edelman* "held that suit was proper to the extent it sought 'payment of state funds . . . as a necessary consequence of *compliance in the future* with a substantive federal-question determination. . . .'" *Milliken*, 433 U.S. at 289 (emphasis added). The *Milliken* Court described this exception to the Eleventh Amendment as the "prospective-compliance exception" that "had its genesis in *Ex parte Young*." *Id.*

It is the power given federal courts under *Young* to grant injunctive relief, prospective in nature, against state officials to force compliance with federal law, that carries with it the power to issue additional orders, so long as they are ancillary to the injunction, without violating the Eleventh Amendment bar. For example, in *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978), the Court pointed out that "the . . . power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief."

This brings us to *Quern* and the "notice relief" authorized by that decision. Following the Supreme Court's remand in *Edelman*, the District Court ordered the state officials to send to each member of the plaintiff class a notice that informed the recipient, in pertinent part, that "you were denied public assistance to which you were entitled in the amount of $————." *Jordan* v. *Trainor*, 405 F. Supp. 802, 809 (N.D. Ill. 1975). The mailing containing the notice also included a returnable "Notice of Appeal," which stated in relevant part that "[t]he department illegally delayed in the processing of my AABD application, and, as a consequence, denied me benefits to which I was and am entitled." *Id.* at 810. The Seventh Circuit Court of Appeals, sitting en banc,

reversed the District Court's order on the ground that it constituted a "money judgment against the state" and, therefore, controverted the Eleventh Amendment. *Jordan* v. *Trainor*, 563 F.2d 873, 875 (7th Cir. 1977). The Court of Appeals reasoned that the language of the notice ordered by the District Court was objectionable in that it ordered, "in effect, the payment of state funds by retroactive award to the members of the plaintiff class for past action or inaction by the State of Illinois." *Id.*

The Seventh Circuit did hold, however, that on remand the District Court could order the state officials to send a "mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits. A simple returnable notice of appeal form could also be provided." *Trainor*, 563 F.2d at 875. The Supreme Court affirmed the en banc decision of the Seventh Circuit. *Quern* v. *Jordan*, 440 U.S. 332 (1979). Before reaching the pertinent issue in *Quern*, the Court restated the principles upon which its decision was based:

> In *Edelman* we reaffirmed the rule that had evolved in our earlier cases that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. 415 U.S., at 663; see *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944). We rejected the notion that simply because the lower court's grant of retroactive benefits had been styled "equitable restitution" it was permissible under the Eleventh Amendment. But we also pointed out that under the landmark decision in *Ex parte Young*, 209 U.S. 123 (1908), a federal court, consistent with the Eleventh Amendment, may enjoin

> state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. 415 U.S., at 667-668; see *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977); *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974). The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other.

Quern, 440 U.S. at 337 (footnote omitted).

The *Quern* Court was of the opinion that the notice relief approved by the Seventh Circuit "falls on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman side.*" 440 U.S. at 347. In rejecting petitioner's argument "that giving the proposed notice will lead inexorably to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award," the *Quern* Court pointed out that the chain of causation linking the federal court's notice relief with any monetary award "contains numerous missing links, which can be supplied, if at all, only by the state and members of the plaintiff class and not by a federal court." *Quern*, 440 U.S. at 347. The Court further characterized the notice relief as follows:

> *The notice approved by the Court of Appeals, unlike that ordered by the District Court, is more properly viewed as ancillary to the prospective relief already ordered by the court.* See *Milliken* v. *Bradley*, 433 U.S. at 290. The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue.

Quern, 440 U.S. at 349 (emphasis added).

Although the Justices sharply disagreed on the question of whether a state is a "person" for purposes of 42 U.S.C. § 1983, all were in agreement that the notice relief in *Quern* was ancillary to the prospective relief already ordered. "The Court today correctly rules that the explanatory notice approved by the Court of Appeals below is 'properly viewed as ancillary to . . . prospective relief.'" 440 U.S. at 350 (Brennan, J., concurring); "the explanatory notice approved by the Court of Appeals clearly is ancillary to prospective relief." 440 U.S. at 366 (Marshall, J., concurring).

B.

In the present cases, plaintiffs, as a result of the change in federal law and defendant's conformance to the federal law, no longer had any ground for an injunction to prevent defendant from violating plaintiffs' rights under federal law, nor did they any longer seek such an injunction. The fundamental requirement of the *Young* doctrine, ongoing conduct by a state official allegedly in violation of federal law, that would have empowered the District Court to issue an injunction to force compliance with federal law as an exception to the jurisdictional bar of the Eleventh Amendment was simply no longer present. Thus, at the time the District Court dismissed the complaints, the foundation that supports the granting of ancillary orders against state officials without violating the Eleventh Amendment—the basic injunction to force compliance with federal law—was not present under the circumstances of these cases.

Without the foundation of a *Young* injunction to support a notice order, plaintiffs in the present cases nevertheless sought to have the District Court declare that the past conduct of the defendant state official had violated federal law for the sole purpose of ordering the state official to send *Quern*-type notices to members of the putative classes. Plaintiffs contend that the notice relief they seek could have been ordered consistent with the

Eleventh Amendment because, as they argue, "[d]espite its apparently more expansive text, the Eleventh Amendment has long been held to be a bar only to money judgments and not to injunctive relief against the states. *Edelman* v. *Jordan*, 415 U.S. at 663, citing cases." [12] This reading of *Edelman*, however, has been expressly rejected by the Court in *Cory* v. *White*, 457 U.S. 85 (1981), in which the Court said,

> [Edelman] involved a suit against state officials claiming that their administration of a particular federal-state program was contrary to federal regulations and the Constitution. Among other things, the plaintiffs sought a judgment for benefits that had not been paid them. The case was against individual officers who allegedly were violating federal law, and it therefore arguably fell outside the reach of the Eleventh Amendment under *Ex parte Young*, 209 U.S. 123 (1908). *Edelman* held, however, that the case was in effect a suit against the State itself because a judgment payable from state funds was demanded. It was correctly noted that *Ford Motor Co.* v. *Department of the Treasury*, 323 U.S. 459 (1945), was authority for this result.
>
> *Edelman* did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. The Eleventh Amendment reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ." Thus, the Eleventh Amendment by its terms clearly applies

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[12] Appellants' Brief, at 11-12.

> to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself. *Edelman* did not embrace, much less imply, any such proposition.

Id. at 90-91 (footnote omitted).

It is only through the fiction of *Young* that injunctions may be issued against state officials and only when it is alleged that they are acting in a manner contrary to federal law. As the fiction creates the exception to the Eleventh Amendment bar, it also limits the remedies that can be awarded. A *Quern*-type order, when it does nothing more than advise plaintiffs of the Court's issuance of a *Young* injunction and administrative remedies that might be available to plaintiffs, is deemed ancillary to the Young relief permitted by the Eleventh Amendment. Consistent with the fiction of *Young*, an order compelling a state official to send such notices—if it is ancillary to the *Young* injunction and prospective in its application—is still not an action against the state itself.

It is not enough that the requested orders in the present cases would have operated "prospectively" in the same sense that the notice in *Quern* was "prospective," that is, compelling future action that did not involve an invasion of the state treasury for the purpose of payment for past wrongdoing. Even orders and injunctions against state officials that are purely prospective in this sense are subject to the prohibitions of the Eleventh Amendment. *Cory* v. *White*, 457 U.S. 85 (1981). To escape the bar of the Eleventh Amendment, an order against state officials must be both "prospective" *and* ancillary to a *Young* injunction ordering state officials to comply with federal law—the "prospective-compliance exception." *Milliken*, 433 U.S. at 289. Because it is the fiction of *Young* that shelters such ancillary orders from

not being orders against the state, when the basis of that fiction—the need for injunctive relief to force state officials to comply with federal law—disappears, so does the shelter.

Plaintiffs argue that the "ancillary" statement at the end of the *Quern* opinion was an "afterthought," and that the Court did not intend to require that notice relief be ancillary to a *Young* injunction previously ordered. While it is true that the Court has not always been consistent in its use of this word in Eleventh Amendment jurisprudence,[14] we do not view the statement as a thoughtless comment. To the contrary, for the reasons stated, the Court's finding of ancillarity was needed to bring the order within the penumbra of the *Young* doctrine.

Finally, plaintiffs contend that if *Quern* requires notice relief to be "ancillary" to other prospective relief, then the notice relief requested in the present case could be considered ancillary to the preliminary injunction entered in *Banas* or to the declaratory judgments sought in both *Banas* and *MWRO*. The difficulty with this suggestion is that both remedies are inadequate to support the additional orders requested by plaintiffs. The *Banas* injunction was expressly modified so that it would have no prospective effect after the change in law became effective on October 1, 1981. After that date, there was no conduct in violation of federal law to be enjoined, and thus the injunctive relief, which may have served as the predicate for an order requiring notice relief, had been eliminated. Any declaratory judgment in these cases would concern only the past conduct of the state official, a finding, in retrospect, that certain activities of the

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[14] *Young* injunctions are permissible even though there is "an ancillary effect on the state treasury," *Edelman*, 415 U.S. at 668; a fine and attorney's fees are properly treated as "ancillary to the federal court's power to impose injunctive relief," *Hutto*, 437 U.S. at 691; notice relief is "ancillary to the prospective relief already ordered by the court." *Quern*, 440 U.S. at 349.

state officials had previously violated plaintiffs' rights under federal law. In our view, such a declaration would not be prospective in nature, and therefore an order based solely on a declaration regarding the *past* conduct of the state official would not be an order falling within the "prospective-compliance" exception necessary to bring it "on the *Ex parte Young* side of the Eleventh Amendment." *Quern*, 440 U.S. at 347.

V.

These cases illustrate, as the Supreme Court acknowledged in *Edelman*, that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." 415 U.S. at 667. The Supreme Court has also very recently observed that "the theory of *Young* has not been provided an expansive interpretation," *Pennhurst*, —— U.S. at ——, 104 S. Ct. at 909, 79 L. Ed. 2d at 80, and the Court has emphasized the importance of recognizing that the principle of sovereign immunity of the states is a constitutional limitation on the federal judicial power established in Article III of the Constitution. *Id.* at ——, 104 S. Ct. at 906, 79 L. Ed. 2d at 77.

Under the unique circumstances of the present cases, we believe the District Judge was correct in his conclusion that at the time he ruled on the motions to dismiss, any further relief was barred by the Eleventh Amendment.

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-1546

CAROL BANAS, ET AL., PLAINTIFFS-APPELLANTS

v.

JOHN T. DEMPSEY, DEFENDANT-APPELLEE

MICHIGAN WELFARE RIGHTS ORGANIZATION, ET AL., PLAINTIFFS-APPELLANTS

v.

JOHN T. DEMPSEY, DEFENDANT-APPELLEE

[Filed Aug. 22, 1984]

Before: LIVELY, Chief Judge; JONES, Circuit Judge; and HOLSCHUH, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party shall bear their own costs on appeal.

ENTERED BY ORDER
OF THE COURT
JOHN P. HEHMAN
Clerk

/s/ John P. Hehman
Clerk

Issued as Mandate: October 30, 1984

Costs: None

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-1546

CAROL BANAS, ET AL., PLAINTIFFS-APPELLANTS

vs.

JOHN T. DEMPSEY, DEFENDANT-APPELLEE

MICHIGAN WELFARE RIGHTS ORGANIZATION, ET AL., PLAINTIFFS-APPELLANTS

vs.

JOHN T. DEMPSEY, DEFENDANT-APPELLEE

[Filed Oct. 18, 1984]

Before: LIVELY, Chief Judge; JONES, *Circuit Judge*; HOLSCHUH, District Judge *

ORDER DENYING PETITION FOR REHEARING EN BANC

A majority of the Court having not voted in favor of an en banc rehearing, the petition has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
Clerk

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* The Honorable John D. Holschuh, Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

SUPREME COURT OF THE UNITED STATES

No. 84-6270

JOHNNY GREEN, ET AL., ETC., PETITIONERS

v.

AGNES MARY MANSOUR, Director, Michigan Department of Social Services

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 1, 1985

Office - Supreme Court, U.S.
FILED
MAY 30 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-6270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHNNY GREEN, GAIL BLESSING, THERESA E. COVEYOU, GILDA MILLS, and JUDGE MILLS on behalf of themselves, their children, and all others similarly situated,
Petitioners,

v.

AGNES MARY MANSOUR, Director, Michigan Department of Social Services,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

In an action under 42 USC § 1983 against a state officer for violations of federal law, does the Eleventh Amendment bar an injunctive order for notice relief to remedy past violations of federal law when no injunctive relief to restrain future violations is possible?

LIST OF PARTIES

All parties are listed in the case caption. Named plaintiff Gail Blessing was dismissed as to some claims and intervening plaintiff Johnny Green was added in the District Court. Counsel have lost contact with named plaintiffs Michael and Linda Kelley, Amelia Van Burger, Mary Jones, and John Kiever, but they remain members of the proposed class. Defendant John T. Dempsey's successor in office as Director of the Michigan Department of Social Services is Agnes Mary Mansour.

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OPINIONS BELOW

The opinion of the Court of Appeals appears at 742 F.2d 277 (6th Cir. 1984). J.A. at 156. The opinions of the District Court for the Eastern District of Michigan are not published; copies are included in the Joint Appendix at 36 and 141.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 22, 1984. A timely petition for rehearing *en banc* was denied on October 18, 1984, and a petition for certiorari was filed within ninety days of that date. Jurisdiction in the District Court was based on 28 USC 1331 and 1343(3), and this Court's jurisdiction is invoked under 28 USC Section 1254(i).

APPLICABLE PROVISIONS OF LAW

1. The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State; or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

The present case of *Green* v. *Mansour* is comprised of two cases, *Michigan Welfare Rights Organization* v. *Dempsey* and *Banas* v. *Dempsey*, which were jointly appealed to the Sixth Circuit Court of Appeals. Because the facts of each are different, they are described below separately.

A. The Child Care Case (*MWRO* v. *Dempsey*)

Plaintiffs/Petitioners filed a class action complaint on April 11, 1980, seeking relief under 42 USC Section 1983

and challenging certain regulations of defendant/respondent, the Director of the Michigan Department of Social Services (MDSS), that denied a work expense deduction for child care expenses incurred by employed Aid to Families with Dependent Children (AFDC) recipients who needed such child care to enable them to keep their jobs.

Plaintiffs alleged that by wrongfully refusing to deduct these child care costs, defendant was depriving them of benefits to which they were entitled under Title IV-A of the Social Security Act in violation of the Supremacy Clause. Plaintiffs further asserted that, in failing to inform them of their right to claim child care expenses and of their right to request an administrative hearing to challenge the resulting denial of benefits, defendant was violating not only federal regulations but also the due process and equal protection clauses of the Fourteenth Amendment. J.A. at 11-14.

Prior to October 1, 1981, federal law required a state participating in AFDC to disregard from earned income the full amount of any expenses reasonably attributable to the earning of such income. This included child care expenses incurred by working parents. Plaintiffs asserted that defendant's refusal to permit child care costs actually incurred to be considered as an allowable expense of employment in calculating budgetable earned income violated *Shea* v. *Vialpando*, 416 US 251 (1974).

Plaintiffs sought class certification, a declaratory judgment that defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged practices, notice relief to advise all class members who lost benefits in the past of their right to an administrative review under state procedures, and attorney's fees. J.A. at 13, 14.

Effective October 1, 1981, and before plaintiffs could move for summary judgment, Congress amended the relevant portion of the Social Security Act, 42 USC § 602(a). The amendment confirmed the earlier requirement that the state agency disregard (from earned income) expenditures for child care costs required to be incurred for care of a dependent child, but imposed a maximum dollar limit on that deduction. See Omnibus Budget Reconciliation Act of 1981, Pub.L.No. 97-35, 95 Stat. 357-933 (1981), presently codified in 42 USC § 602(a)(8)(A)(iii). Defendant thereupon changed state regulations to permit child care deductions but limited the amount that could be claimed. These changes in state law were also effective October 1, 1981, and were consistent with the amended provisions of federal law.

After the federal statutory change, plaintiffs moved for summary judgment on the merits of their claim that defendant's prior policies violated pre-October 1, 1981, federal law. Plaintiffs sought an order requiring the defendant state official to issue a notice similar in content to that approved by the Supreme Court in *Quern* v. *Jordan*, 440 US 332 (1979). Defendant moved to dismiss, arguing that the federal law change had rendered moot any claims of violations of pre-October 1, 1981, federal law and that the Eleventh Amendment barred any relief, including an order requiring issuance of a *Quern*-type notice, on behalf of persons who had lost benefits as a result of defendant's past actions.

On June 22, 1982, the District Court granted the motion to dismiss on the grounds urged by the defendant and denied plaintiff's motions for summary judgment and class certification. See appendix to Petition for Certiorari. The Sixth Circuit affirmed, holding that the case was not moot, but that the Eleventh Amendment barred

the requested relief. See 742 F.2d 277 (6th Cir. 1984). J.A. at 36.

B. The Stepparent Case (*Banas* v. *Dempsey*)

On May 11, 1981, nine named plaintiffs filed a class action complaint, seeking relief under 42 USC Section 1983, and challenging policies of the defendant Director of the MDSS which required that income of stepparents be considered in determining AFDC eligibility or grant levels for indigent stepchildren otherwise eligible for AFDC who lived in the same household as the stepparent. Plaintiffs claimed that the defendant's policies violated the applicable provision of Title IV-A of the Social Security Act and regulations pursuant thereto. The applicable regulations prohibited states from assuming stepparent income or resources to be available to stepchildren unless there existed, under a state law of general applicability, a legal obligation on the stepparent to support stepchildren that was coextensive with the obligation of support imposed on natural and adoptive parents. See 45 CFR § 233.90(a)(1) (1981) and *King* v. *Smith*, 392 US 309 (1968) and *Lewis* v. *Martin*, 397 US 552 (1970).

Plaintiffs alleged an equal protection violation as a result of a section of the Michigan Poor Law that required stepparents to take on a greater responsibility for support of stepchildren eligible for AFDC benefits than was required of stepparents of stepchildren who were not eligible for AFDC benefits. Plaintiffs alleged that the Michigan Poor Law impermissibly burdened plaintiffs' rights of family privacy and free association by encouraging stepparents to move out of the home or to get a divorce if they were already married and by discouraging prospective stepparents to marry.

Plaintiffs also contended that while defendant's regulations generally permitted dependent children and their

caretaker relatives to deduct from gross earned income all actual expenses of producing that income, they required that eighty percent of the gross earnings of a stepparent be automatically counted as available income without allowing for any work expense deductions. Plaintiffs asserted that this disparate treatment of the incomes of stepparents and other caretaker relatives violated the Social Security Act and federal equal protection guarantees.

Plaintiffs sought class certification, a declaratory judgment that the state statute and defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged law and practices, notice relief to advise all class members who had lost benefits in the past of their right to administrative review under state procedures, and attorney's fees. J.A. at 64.

Preliminary injunctive relief was granted by the district court and the defendant appealed the order. On May 28, 1981, and before the appeal of the preliminary injunction could be heard, Congress amended the relevant portion of the Social Security Act, 42 USC § 602(a), effective October 1, 1981, to require that income of stepparents living in the same household as a stepchild which exceeds a specified amount be counted for the purposes of determining eligibility and amount of benefits for AFDC. See Omnibus Budget Reconciliation Act of 1981, Pub.L.No. 97-35, 95 Stat. 357-933, presently codified at 42 USC § 602(a)(31). Defendant changed Michigan's stepparent regulation, also effective October 1, 1981, to bring it into compliance with the new federal law. As a result of these changes in state and federal law, the District Court amended the preliminary injunction by stipulation, limiting its prospective effect to the period before October 1, 1981, and the defendant voluntarily dismissed his appeal.

Plaintiffs then filed a motion for summary judgment, seeking a declaration that the defendant's pre-October 1, 1981, policies violated the Social Security Act's requirements before that date and an order compelling the issuance of a notice similar in content to that approved by the Supreme Court in *Quern* v. *Jordan*, 440 US 332, (1979). Defendant filed a motion to dismiss the action, arguing that plaintiffs' claims were mooted by the amendment to the Social Security Act and that the Eleventh Amendment was a bar to the relief sought by plaintiffs.

On June 22, 1982, the District Court issued its memorandum Opinion and Order granting defendant's motion to dismiss the action and denying plaintiffs' motions for summary judgment and class certification. See appendix to Petition for Certiorari. The Sixth Circuit affirmed, holding that the case was not moot, but that the Eleventh Amendment barred the requested relief. See 742 F.2d 277 (6th Cir. 1984), J.A. at 141.

RESTATEMENT OF QUESTION PRESENTED

In an action under 42 USC § 1983 against a state officer for violations of federal law, does the Eleventh Amendment bar an injunctive order for notice relief to remedy past violations of federal law when no injunctive relief to restrain future violations is possible?

SUMMARY OF ARGUMENT

I.

By Well Established Precedent, Declaratory And Notice Relief Are Not Barred By The Eleventh Amendment Under The Circumstances Of This Case.

A. The plaintiffs in this case are seeking exactly the same relief that was sought by the plaintiffs in the *Jordan* litigation. In *Edelman* v. *Jordan*, 415 US 651 (1974), this

Court reversed, on Eleventh Amendment grounds, the entry of an award of retroactive benefits against state welfare officials. The Court let stand, however, a declaratory judgment holding that the state officials had violated federal law in the past. In *Quern* v. *Jordan*, 440 US 332 (1979), in lieu of the voided order for retroactive benefits, this Court approved an order for notice relief which directed state officials to inform the plaintiffs who had lost benefits that their federal rights had been violated in the past, and that they might therefore be entitled to a state administrative remedy. The plaintiffs here are requesting the same declaratory and notice relief that was approved in *Edelman* and *Quern*, so that those cases should control and the relief should be granted.

B. The Eleventh Amendment forbids suits against States. However, when a state official violates federal law, he is stripped of his state authority under the doctrine of *Ex Parte Young*, 209 US 123 (1908), and is subject to suit so that federal rights may be vindicated. Under *Edelman* and *Quern*, *supra*, a federal court can, consistent with the Eleventh Amendment, (1) enter declaratory relief holding that federal law was violated, (2) grant notice relief to those affected by the past violations, and (3) issue an injunction requiring future compliance with federal law, regardless of the cost to the state. The court *cannot*, consistent with the Eleventh Amendment, make a retroactive award of money damages, because to do so implicates the state as a real party in interest, and is barred by sovereign immunity. Where, as here, no money judgment or retroactive award is sought, the simple request for notice relief does not affect the state treasury and therefore is not barred. Notice relief has no impact on the state treasury because, as *Quern* held, even if some plaintiffs eventually recover their lost benefits (after being told of the state administrative remedy), that recovery will be

the result of the actions of state agencies and state courts pursuant to state law.

Alternatively, even if notice relief has a fiscal impact on the state that might otherwise implicate the state's immunity, this Court has already ruled that such an impact is permissible when it is a necessary consequence of future compliance with federal law. In *Quern* this Court concluded that an order for notice relief directed to welfare recipients who lost benefits in the past constitutes permissible prospective relief because such an order fits the "prospective-compliance exception" set out in *Milliken* v. *Bradley*, 433 US 267 (1977) *(Milliken II)*.

Therefore, notice relief against a state officer alleged to have acted in violation of federal law does not violate the Eleventh Amendment because (a) notice relief has no cognizable impact on the state treasury, and (b) notice relief is itself permissible prospective relief as defined in this Court's Eleventh Amendment holdings.

C. The Fourth, Fifth, Ninth, and Eleventh Circuits have all approved, on authority of *Quern*, adjudications of past violations of federal law and the entry of notice relief to class members affected, despite the absence of any ongoing conflict between federal and state law. These circuits, implicitly or explicitly, have rejected the argument of the Sixth Circuit here that some ongoing injunction, aside from notice relief itself (together with the concomitant federal question determination that the defendants acted illegally), must precede an award of notice relief. In all four circuits the courts have decided the federal question relating to past violations of federal law and entered declaratory and notice relief on behalf of the plaintiffs. Only the Second Circuit has denied relief under these circumstances, and that was in a *per curiam*

opinion, without analysis, adopting the opinion of a district court.

II.

The Sixth Circuit Held That Notice Relief Was Barred For Two Reasons, Neither Of Which Can Withstand Scrutiny.

A. The court below relied on *Cory* v. *White*, 451 US 85 (1981), for the proposition that *any* injunctive action against the state is barred by the Eleventh Amendment. But *Cory* was a diversity case that involved no allegation of violations of federal law. The plaintiffs in *Cory* therefore could not invoke the doctrine of *Ex Parte Young*, which permits injunctive suits against state officials alleged to be acting contrary to federal law. If *Cory* said what the Sixth Circuit claims, *Ex Parte Young* would have been overruled.

B. The Sixth Circuit erred by concluding that notice relief is barred by the Eleventh Amendment unless it is both prospective *and* ancillary to some other permanent injunctive relief already entered. The Sixth Circuit's conclusion is wrong because since notice relief is itself prospective, and does not constitute a money judgment, it is a permissible form of relief under this Court's Eleventh Amendment holdings, and it need not be "ancillary" to any *other* prospective relief.

The Sixth Circuit's error can be traced to its misreading of one sentence in *Quern* v. *Jordan*, *supra*. The Sixth Circuit fails to note that in *Quern* this Court distinguished only between the effect of the notice drafted by the district court and the effect of the notice approved by the Seventh Circuit, and not between those courts' power to enter notice relief at all. A federal court has the authority to enter any form of relief not barred by the Eleventh

Amendment, and notice relief is appropriate under *Quern* as long as the notice imposes only "ancillary" costs that are "a necessary consequence of compliance in the future with [the] substantive federal question determination." *Milliken* v. *Bradley*, 433 US 267, 289 (1977) *(Milliken II)*. Thus, the district court's notice in *Quern* was barred because it read like a money judgment, while the Seventh Circuit's notice was approved in *Quern* because it would impose only "ancillary" costs as a consequence of future compliance with the federal question determination that state officials had violated federal law. Finally, the Sixth Circuit's conclusion that notice relief cannot be entered absent some ongoing violation of federal law is contradicted by the facts of *Quern* itself. There notice relief was entered despite the fact that the permanent injunction was moot and no ongoing violation of federal law existed.

ARGUMENT

I. BY WELL ESTABLISHED PRECEDENT, DECLARATORY AND NOTICE RELIEF ARE NOT BARRED BY THE ELEVENTH AMENDMENT UNDER THE CIRCUMSTANCES OF THIS CASE.

After this Court's decisions in *Edelman* v. *Jordan*, 415 US 651 (1974) and *Quern* v. *Jordan*, 440 US 332 (1979), a federal court adjudicating a class action suit against state officials to enforce the provisions of the Social Security Act may enter three forms of relief: (1) a declaratory judgment that the state regulation in question violated applicable federal law, (2) an injunctive order requiring state officials to send notices to all class members affected by the regulation in the past, explaining that their rights were violated and that state remedies exist if they wish to seek redress for their losses, and (3) an injunction restraining the future operation of the illegal regulation.

The present case was filed originally seeking all three forms of relief. However, changes in federal law and

changes in the state regulations have eliminated any present conflict between the two, thereby rendering moot the third category of relief—the injunction against future violations. Despite the difference between this case and one where the need for a permanent injunction would be continuing, it is plaintiffs' contention that the Eleventh Amendment does not bar the other two forms of relief—declaratory and notice relief. Specifically, plaintiffs contend that the Eleventh Amendment considerations involved in the present case are no different from those involved in *Quern* v. *Jordan*, *supra*—the case in which this Court explicitly held that notice relief does not violate the Eleventh Amendment.[1]

A. Petitioners Here Seek Exactly The Same Relief That Was Approved By This Court In The *Jordan* Litigation.

The *Jordan* litigation[2] involved allegations that state

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[1] The adjudication of illegality need not take the form of a separate formal declaratory judgment, but may be in the form of an opinion or other findings of fact and conclusions of law. See Federal Rule of Civil Procedure 52 and *Appleyard* v. *Wallace*, 754 F.2d 955, 962 (11th Cir. 1985) (no other form of relief need precede an order for notice relief "aside from the notice itself together with a concomitant determination that the defendants acted illegally"). Of course, the fact that a federal court renders *any* sort of relief on behalf of a party means that, in effect, the court has rendered a declaratory judgment in favor of that party. Cf. *Milliken* v. *Bradley*, 418 US 717, 734 (1974) (*Milliken I*) (scope of remedies awarded by federal court may not exceed the scope of the violation of federal law found by that court).

[2] A complete citation history of the *Jordan* litigation is as follows: *Jordan* v. *Weaver*, No. 71 C 70 opinion (ND Ill., Feb. 1972); judgment (ND Ill., March 1972) (Appendix to this brief at 1a, 4a); aff'd 472 F.2d 985 (7th Cir. 1973), rev'd in part, *sub nom. Edelman* v. *Jordan*, 415 US 651 (1974); *Jordan* v. *Trainor*, 405 F.Supp 802 (ND Ill, 1975) (on remand); rev'd, 551 F.2d 152 (7th Cir. 1977); rev'd, *Jordan* v. *Trainor*, 563 F.2d 873 (7th Cir. 1977) (*en banc*); aff'd *sub nom. Quern* v. *Jordan*, 440 US 332 (1979).

regulations violated federal law regarding the prompt processing of applications for Aid to the Aged, Blind and Disabled (AABD).[3] In that case, the district court in 1972 granted summary judgment and entered three forms of relief: (1) a declaration that the state AABD application processing regulations violated federal law from 1968 up to the date of judgment.[4] (2) an injunction ordering that retroactive benefits be paid to class members who lost benefits in the past as a result of the invalid state regulations,[5] and (3) an injunction against future violations of federal law.[6] Effective in 1974, Congress abolished the AABD program, thereby rendering the third category of relief moot. See *Edelman* v. *Jordan*, 415 US 651, 653 n.2 (1974) and *Quern* v. *Jordan*, 440 US 332, 348 n.20 (1979).[7]

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[3] The AABD program had the same basic structure as does the AFDC program involved in this case.

[4] *Jordan* v. *Weaver*, No. 71 C 70, judgment at 3, ¶ 2, 4 (ND Ill, March 15, 1972) and opinion *sub nom. Jordan* v. *Swank*, at 2 (ND Ill, Feb. 4, 1972), Appendix to this brief at 4a and at 1a respectively. See also *Jordan* v. *Weaver*, *472 F.2d 985, 996 (7th Cir. 1973), rev'd on other grounds sub nom. Edelman* v. *Jordan*, 415 US 651 (1974) ("The district court . . . found defendants to be noncompliant [with federal prompt processing regulations] from and after the effective date of the regulations [July 1, 1968].") and *Edelman* v. *Jordan*, 415 US at 656.

[5] *Jordan* v. *Weaver*, No. 71 C 70, judgment at 3-5, ¶ 5 (ND Ill, March 15, 1972), Appendix to this brief at 4a. See also *Edelman* v. *Jordan*, 415 US at 656.

[6] *Id* at 1-2, ¶ 1, 3. Appendix to this brief at 4a, 5a. See also *Edelman* v. *Jordan*, 415 US at 656.

[7] When "the terms of [an] injunction . . . have been fully and irrevocably carried out," that relief is moot. *University of Texas* v. *Camenisch*, 451 US 390, 398 (1981) (preliminary injunction). Since, effective January 1, 1974, there would be no AABD applications for Illinois officials to process, an order requiring them to process applications promptly would have no further prospective effect.

In *Edelman* v. *Jordan*, *supra*, the second form of relief (the retroactive benefit order) was held void by this Court as violative of the Eleventh Amendment. In compliance with the *Edelman* opinion, on remand the district court vacated the retroactive award and substituted an order for notice relief. *Jordan* v. *Trainor*, 405 F.Supp 802, 803-804, 808-809 (ND Ill. 1975). The *en banc* Seventh Circuit, reversing a prior panel decision, modified the content of the notice ordered to be sent, but otherwise approved the district court's order. *Jordan* v. *Trainor*, 563 F.2d 873, 875 (7th Cir. 1977) *(en banc)*.[8] This Court affirmed the Seventh Circuit, holding that the modified notice relief was permissible despite the Eleventh Amendment. *Quern* v. *Jordan*, 440 US 332 (1979).

Thus the forms of relief in the *Jordan* litigation which survived both the congressional changes and this Court's action in *Edelman* and *Quern*, were (1) a declaratory judgment that a state welfare regulation violated federal law in the past, and (2) an order for notice relief to the class affected by that invalid regulation.[9] This is precisely

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[8] The *en banc* opinion deleted language from the notice forms stating that class members were entitled to a state administrative award of retroactive benefits in a specified amount. 563 F.2d at 875. The *en banc* Court of Appeals observed: "The objectionable content of the notice forms are not in keeping with the views expressed by the trial judge in his memorandum opinion to which they were attached. With those views, but not the forms, we agree." *Id.* See *infra* this brief pp. 39-40 for a more complete discussion of the difference between the district court's notice form and the modified notice held proper by the *en banc* Seventh Circuit and this Court.

[9] This Court's decision in *Edelman* did not affect the declaratory portions of the relief ordered by the district court. To the contrary the *Edelman* Court agreed with the lower courts' holdings that the federal regulations were a valid exercise of HEW's power and that they were binding on the defendant state officials. 415 US at 659 n.8.

the same relief sought by the Michigan plaintiffs below. Here, petitioners originally requested three forms of relief: (1) a declaratory judgment that state regulations on child care deductions and stepparent deeming violated federal law, (2) an injunction ordering notice relief to all class members affected by the invalid regulation in the past, and (3) a preliminary and permanent injunction against future enforcement of those regulations. See *Banas* Complaint, Relief, paragraphs (c), (d), and (e), J.A. at 13, 14, and *Green* Intervenor Complaint, Relief, paragraphs (c), (d), and (e), J.A. at 118, 119. However, just as in *Jordan*, a change in federal law mooted the petitioners' third request for relief—the request for a preliminary and permanent injunction against future enforcement of the illegal regulations. See Omnibus Budget Reconciliation Act, Pub.L.No. 97-35, 95 Stat. 357-933, effective October 1, 1981. Nonetheless, and again just as in *Jordan*, the petitioners pursued their claims for notice relief.

The importance of an order for notice relief to class members who have lost benefits in the past, both in the *Jordan* litigation and in the present case, is clear: the notice advises class members of available state remedies to which they may resort, if they choose. Primary among those state remedies is the administrative hearing pro-

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Further, in *Edelman* the Illinois officials contended in the Court of Appeals and in the Supreme Court that the declaratory portion of the district court judgment should be given prospective effect only under the rule of *Chevron Oil Co.* v. *Huson*, 404 US 97 (1971). *Id.* at 658 n.7. This argument was rejected by the Court of Appeals and this Court declined to disturb that ruling. *Id.* See also *Quern* v. *Jordan*, 440 US at 347 n.18 (rejecting Illinois officials' arguments that entry of an order for notice relief violated the rule of the case established by *Edelman* and that the district court lacked the power to order notice relief under the terms of the Court's *Edelman* remand).

cess.[10] At all times relevant to both the AABD program involved in the *Jordan* litigation and the AFDC program involved in the case at bar, federal law has required states to provide the opportunity for an administrative hearing to all applicants or recipients who are aggrieved by actions of the state agency affecting their grant. 45 CFR § 205.10(a)(5) (1973-1984). If the action at the hearing is favorable to the claimant, or if the state agency decides in the claimant's favor prior to the hearing, the agency must "make corrective payments retroactive to the date the incorrect action was taken." 45 CFR § 205.10(a)(18) (1973-1984). See also 45 CFR § 233.20(a)(13) (1984), ("Underpayment means a financial assistance payment received by or for an assistance unit for the payment month which is less than the amount for which the assistance unit *was eligible*, or failure by the State to issue a financial assistance payment for the payment month to an eligible assistance unit if such payment *should have been issued*.") (emphasis supplied). Consequently, any retroactive benefits ordered by the state must be calculated by applying the valid rules in effect at the time benefits were lost to the claimant's circumstances as they existed at that time.

Michigan's administrative hearing regulations track the federal requirements closely. Michigan Administrative Code Rule (MACR) 400.918 provides:

> When a hearing decision is favorable to the claimant, or when the department decides in favor of the claimant prior to a hearing, the department shall make

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[10] Of course other remedies may be available, including suit in state court. In Michigan this would be possible in the Court of Claims or in the Circuit Court. See Mich. Comp. Laws § 400.37 and § 600.6401-6475.

> corrective retroactive payments promptly in accord with federal regulations.

J.A. at 155. See also MACR 400.903(1), J.A. at 153, and Mich. Comp. Laws § 400.9. Michigan case law is in accord. In *Tompkins* v. *Dempsey*, 97 Mich App 218, 293 NW 2d 771 (1980), the Michigan Court of Appeals held that the law applicable at the time the AFDC claimant lost benefits applies, and not new law. The court remanded the case to the state administrative law judge "to determine the amount of benefits to which plaintiff would have been entitled under the prior, less restrictive regulation." 293 NW 2d at 774.[11]

An order for notice relief advises class members who have lost benefits because of illegal state regulations of the availability of the state administrative hearing mechanism to remedy that loss. When coupled with the substantive federal question determination necessary for entry of the injunctive order for notice relief, notice relief provides the opportunity for class members to present their claims without the handicap of the illegal state practice or regulation which caused their loss of benefits originally. Barring grounds for denial of the claim not adjudicated by the federal court, class members who wish to pursue a state

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[11] When a federal statutory change "federalizes" a state restriction on eligibility, the change does not generally retroactively ratify past state actions that denied eligibility. In *Lascaris* v. *Shirley*, 420 US 730 (1975) (*per curiam*), an AFDC case before *Quern*, the plaintiffs claimed that New York's support cooperation requirements violated the Social Security Act. *Id.* at 731. By the time the Supreme Court noted probable jurisdiction, Congress had changed the Act to authorize cooperation requirements similar to those in New York. The Court noted the change in law, but affirmed the determination of the lower court that the policy violated the Act before it was amended by Congress. *Id.* See also *Beltran* v. *Myers*, 451 US 625, 629 (1981) (Stevens, J., concurring).

remedy should eventually receive an appropriate corrective payment as provided for by *state* law.[12]

Whether or not the petitioners here will be able to recover their benefits under state administrative procedures is yet unknown. However, as this Court said in response to factual problems of recovery raised by Illinois officials in *Quern*, "These facts may influence a plaintiff class member in deciding whether to pursue existing state administrative remedies . . ., but they do not affect our conclusion that the notice relief awarded here is permissible under the Eleventh Amendment." 440 US at 348 n.20. The petitioners below requested exactly the same relief that was sought and granted in the *Jordan* litigation. Given this Court's clear holding, the Sixth Circuit's decision that notice relief violates the Eleventh Amendment cannot stand, and it should therefore be reversed.

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[12] In *Quern* v. *Jordan*, *supra*, Illinois officials maintained that notice relief was impermissible because (1) there was little likelihood that the federal government would reimburse the state for assistance payments made relating to a defunct program, and (2) Illinois law in any event barred payment because the state treasury was prohibited from making payments out of funds appropriated for a current fiscal year for an outstanding obligation incurred in a prior fiscal year. 440 US at 348 n.20. Both these problems were surmounted by the *Jordan* class members. Following remand of the case after the *Quern* decision, notices were sent out to class members. The parties received a final administrative hearing decision disclosing the amount of benefits Illinois officials had calculated were lost, but denying their claims on the ground that Illinois law would not allow payment for the second reason stated above. See *Jordan* v. *Quern*, No. 71 C 70, Stipulation (ND Ill. Sept. 27, 1979) (lodged with the Clerk of the Court). Having thus exhausted their administrative remedies, the claimants filed suit in the Illinois Court of Claims, where they recovered a judgment for the amounts they sought. See *Peltz* v. *State of Illinois*, No. 81-CC-1475 opinion, Illinois Court of Claims May 6, 1981 and *Richardson* v. *State of Illinois*, No. 81-CC-2108, opinion (Illinois Court of Claims June 15, 1981) (lodged with Clerk of the Court).

B. The Same Eleventh Amendment Considerations Which Led This Court To Permit Notice Relief In The *Jordan* Litigation Should Lead It To Approve Such Relief In The Present Case Where There Is No Ongoing Violation Of Federal Law.

1. A suit against a state officer who is violating federal law is not a suit against a state unless the relief sought has monetary impact on the state treasury.

In *Ex Parte Young*, 209 US 123 (1908), this Court established the rule that an injunctive suit against a state officer alleged to be acting contrary to federal law "is not one against the State." *Pennhurst State School* v. *Halderman*, ___ US ___, 79 L.Ed.2d 67, 79 (1984) (hereafter *Pennhurst II*); *Young*, *supra*, at 160. In such cases, relief is justified, "notwithstanding the obvious impact on the state itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is 'stripped of his official or representative character.'" *Pennhurst II*, 79 L.Ed.2d at 81, quoting *Young*, *supra*, at 160. When federal rights are violated, the doctrine of *Young* is deemed "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.'" *Pennhurst II*, 79 L.Ed.2d at 81, quoting *Young*, *id.*

Despite *Young*, however, this Court has held that "some forms of injunctive relief against state officials for violations of federal law" will be barred. *Pennhurst II*, 79 L.Ed.2d at 80. The relevant exception to *Young* involved in welfare cases is the bar against "awards of retroactive monetary relief." *Id.* This exception is based upon the case of *Ford Motor Co.* v. *Department of Treasury*, 323 US 459, 464 (1945), in which this Court stated

> [W]hen the action is in essence one for recovery of money from the state, the state is a real substantial

> party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

In *Edelman* v. *Jordan*, 415 US 651 (1974), this Court made it clear that the *Ford Motor Company* exception applies not only to suits for money judgments denominated as such, but also to suits for "equitable restitution" since such relief is "in practical effect indistinguishable . . . from an award of damages against the state." *Id.* at 668. See also *id.* at 666. Thus, the Court held in *Edelman* that the order to pay retroactive welfare benefits to class members in that case violated the Eleventh Amendment. Since the plaintiffs in the present case have never sought any form of monetary relief or retroactive award from the federal court, Michigan's sovereign immunity is not implicated and the suit is not one against the state.[13]

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[13] Though the opinion in *Ford Motor Company* does not refer to history, the money judgment exception to the rule of *Ex Parte Young* is consistent with the concerns of the framers of the Eleventh Amendment. It was just such a suit against the state for a money judgment that was involved in *Chisholm* v. *Georgia*, 2 US 363, 2 Dall. 419 (1793), the case which led to the adoption of that amendment. The commentators generally agree that the fear of suits against states to enforce state debts was the prominent factor in the overwhelming vote in favor of its adoption. See, e.g., Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Government and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L.Rev. 1413, 1437-41 (1975) (concluding that Federalists supported the Eleventh Amendment to gain political support by protecting states against suits by Tory and British creditors); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L.Rev. 682, 683 (1976) (states' fears of suits regarding revolutionary war debts were prominent force behind passage of Eleventh Amendment); Cullison, *Interpretation of the Eleventh Amendment*, 5 Houston L.Rev. 1, 7, 9, 16 (1967) (same).

2. *Quern* v. *Jordan* established that an order for notice relief has no cognizable impact on the state treasury.

Whatever else is required to invoke the *Ford Motor Company* exception, a threshold requirement is that the relief in question have monetary impact, *i.e.*, that it compel the state to pay money. In *Quern* v. *Jordan*, this Court determined that notice relief was a permissible form of injunctive relief precisely because it did not have the prohibited fiscal impact on the state treasury. In *Quern*, state officials argued that notice relief, like the retroactive award struck down in *Edelman*, "will inexorably lead to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award." *Id.* at 347. This argument was rejected by the Court, which held that "notice relief does not constitute a money judgment," *id.* at 348 n.20, because it does not compel the state to pay any money:

> [T]he chain of causation [between the notice relief and any eventual award of benefits] is by no means unbroken; it contains numerous missing links, which can be supplied, if at all, only by the State and members of the plaintiff class and not by a federal court. The notice approved by the Court of Appeals simply apprises plaintiff class members of the existence of whatever administrative procedures may already be available under state law by which they may receive a determination of eligibility for past benefits. . . . [T]he mere sending of [the] notice does not trigger the state administrative machinery. Whether a recipient of notice decides to take advantage of those state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the state, its agencies, courts, and legislature, not with the federal court.

Id. at 347-348.

Thus, *Quern* held that notice relief on behalf of a class that has lost benefits in the past in violation of federal law is a form of injunctive relief that does not violate the Eleventh Amendment. Unlike an award of retroactive benefits, it does not itself compel the state to pay retroactive relief and thus does not cause any forbidden monetary impact on the state treasury. In Eleventh Amendment terms, although the state treasury *may* ultimately be affected *if* class members obtain awards at their state administrative hearings, or in state court, such effect is not caused by the "judicial power of the United States."[14] Any effect is, instead, the result of choices and actions of the plaintiff class members and the actions of *state* agencies and *state* courts following *state* law.

3. Whatever impact an order for notice relief arguably has on the state is justified because notice relief constitutes permissible prospective relief.

Petitioners have argued that *Quern* conclusively establishes that notice relief is permissible because it has no legally cognizable fiscal impact on the state treasury. This fact, in and of itself, is sufficient to remove notice relief from the sweep of the Eleventh Amendment. However, and without conceding the point, even if notice relief is deemed to have some eventual financial impact, *Quern* supports the alternate proposition that such an effect is permissible as part of valid prospective relief.[15]

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[14] U.S. Const., Am. XI.

[15] The only financial effect of an order for notice relief, other than possible retroactive payment awards by state administrative officials or judges, is the cost of sending the notices themselves. As in *Quern*, the state official in the present case has "ma[de] no issue of the incidental administrative expense connected with preparing and mailing the notice." 440 US at 347. Such expense would in any event, this Court observed in *Quern*, be "*de minimis*." *Id.* at 347 n.19.

The *Ford Motor Company* exception to *Young*, as explained in *Edelman*, prohibits money judgments (and their functional equivalents) against states. In *Edelman*, this Court struck down the retroactive award not simply because of its fiscal impact *vel non*, but because it shared a second quality common to all money judgments: its financial impact was immediate and was "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of state officials," thus constituting "a form of compensation" to class members. *Edelman*, 415 US at 668. The retroactive award was distinguished from the prospective injunction (which had as much if not greater fiscal impact) on the ground that the latter's financial impact was not compensatory, but was "a necessary consequence of compliance in the future with a substantive federal question determination." *Id.* at 668. Any impact on the state treasury that results from such compliance is considered a permissible "ancillary effect." *Id.* See also *infra* this brief, Part II(B).

It is petitioners' position that this justification is an alternative explanation of *Quern's* approval of notice relief, and that such justification applies equally to the notice relief sought in the case at bar. In short, it is petitioners' contention that the relief requested below—a declaratory judgment that the state regulation prior to October 1, 1981, violated federal law and an order for notice relief to all persons affected by that violation—constitutes permissible prospective relief.

In *Quern*, the Court posed the question: "Does the . . . notice contemplated by the Seventh Circuit constitute permissible prospective relief or a 'retroactive award which requires the payment of funds from the state treasury'?" 440 US at 346-347. It was held that notice relief fell into the former category. *Id.*

That notice relief or notice relief coupled with declaratory relief is prospective cannot seriously be doubted. As noted above, welfare eligibility, both at the time of *Quern* and currently, is required by both state and federal law to be determined based on the law that was in effect at the time benefits were denied. See *supra* note 11 and accompanying text. Here the question of eligibility and grant levels for the period before October, 1981, if it arises at all, will arise *in the future* because class members are entitled to file state claims for retroactive benefits either in response to any notice relief ordered or on their own initiative once the present litigation is concluded. When this happens, the state will *in the future* need to determine eligibility by looking at pre-October, 1981, federal and state law. The declaration that state regulations violated federal law in the past is prospective because it determines what law will apply in the future when and if those claims are presented. Notice relief is prospective because it requires the defendant in the future to notify class members of possible state remedies that they can pursue, also in the future, to obtain a correct determination of their entitlement and a possible state award of retroactive benefits.

Reference to *Milliken* v. *Bradley*, 433 US 267 (1977), *(Milliken II)*, supports this view. That case is particularly important since the *Quern* opinion cites *Milliken II* in support of its conclusion. See 440 US at 337, 349. *Quern*, *id.* at 349, cites to the very page of the *Milliken II* opinion that discusses, develops, and applies the "prospective-compliance exception" in the context of that case. *Milliken II* involved the illegal segregation of the Detroit public schools. The lower courts had found that the State of Michigan and Detroit officials had "committed acts which have been causal factors in the segregated condition of the public schools in the City of Detroit." See *Bradley* v. *Mil-*

liken, 540 F.2d 229, 233 (6th Cir. 1976). Based upon this finding of past misconduct and other findings, "compensatory" education programs were ordered, the order further providing that the "state defendants and the Detroit Board shall . . . equally bear the burden of such . . . costs imposed by the provisions contained in this judgment and previous orders. . . ." 450 F.2d at 241. Pointing to the finding of past misconduct, the financial impact of the order, and the "compensatory" nature of the programs ordered, the state officials argued that, under *Edelman* v. *Jordan*, *supra*, the Eleventh Amendment was a bar to the relief ordered.

This Court disagreed and upheld the orders. The relief "fit[ ] squarely within the prospective-compliance exception reaffirmed by *Edelman*," 433 US at 289, because it was "designed to eliminate continuing conditions of inequality" caused by past segregative acts. *Id.* at 290.

> These programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke, as could a retroactive award of money in *Edelman*. . . . That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.

433 US at 290 (emphasis by the Court). See also, *Hutto* v. *Finney*, 437 US 678, 691 n.17 (1978) (describing *Milliken II* as a case where "the Court has approved federal rulings requiring a State to support programs that compensate for past misdeeds.").

Following the *Milliken II* Court's elucidation of the prospective-compliance exception, the notice relief in *Quern* and that urged in the present case qualify as valid

prospective relief. Just as in *Milliken II*, the order granting notice relief "operates prospectively," as outlined above. Further, notice relief, unlike the direct retroactive award of money in *Edelman*, does not "wipe the slate clean." Notice relief only notifies recipients of their right to *pursue* a retroactive award under state procedures, and does not itself grant a retroactive award. This was noted specifically by the Court in *Quern* v. *Jordan*, 440 US at 346-347, where the Court spoke of the "numerous missing links" separating the plaintiff class members from any potential awards of retroactive benefits. See *supra* this brief at Part I(B)(2).

There is also a significant parallel between the compensatory education order in *Milliken II* and notice relief in welfare cases in terms of the federal duty to correct the lingering effects of past misconduct. In *Milliken II*, the ongoing federal duty of school officials was the duty "to take the necessary steps 'to eliminate from public schools all vestiges of state-imposed segregation'." *Milliken II*, 433 US at 289-90, quoting *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 US 1, 15 (1971). In the notice relief situation, federal and state welfare law explicitly impose a similar duty "to take steps to eliminate all vestiges" of past state illegality. Federal regulations require state officials to provide notice of the recipient's right to a hearing "at the time of any action affecting his claim," 45 CFR § 205.10(a)(3), and to "promptly make corrective payments retroactive to the date the incorrect action was taken" when recipients prevail on their administrative claims, 45 CFR § 205.10(a)(18) (1984). See also MACR 400.903(l) and 400.918 (quoted *supra* this brief, Part I). In addition, Congress has required, since 1981—in language that is remarkably similar to that used in *Milliken II* and *Swann*—"that the state agency will promptly take all necessary steps to correct any . . . underpayment

of aid under the state plan." 42 USC § 602(a)(22). This requirement applies to all underpayments that are *identified* after September 30, 1981. 45 CFR § 233.20(a)(13)(iii) (1984).

Just as the plaintiffs in *Milliken II* were entitled to prospective relief calculated, albeit imperfectly, to remove the lingering effects of past illegal actions by state officials, so the petitioners here and the plaintiffs in *Quern* were entitled to similarly imperfect prospective relief to remove the continuing effects of the state welfare officials' past illegal regulations.[16]

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[16] In addition to explaining the prospective compliance doctrine of *Edelman*, *Milliken II* makes clear how the Eleventh Amendment does not bar *findings* of past misconduct, but only retroactive *relief* which is entered solely to compensate for that past misconduct and which has an impact on the state sufficient to pierce the fiction of *Ex Parte Young*. That a finding of past misconduct is essential for notice relief is clear from the elementary notion that a federal court may not enter *any* final relief on behalf of a party unless it first determines that that party has prevailed on the merits of his or her claim. *Milliken* v. *Bradley*,418 US 717, 738 (1974) (*Milliken I*) (remedies ordered by a federal court may not exceed the scope of the violation of federal law found); *Fair Assessment in Real Estate Association* v. *McNary*, 454 US 100, 113 (1981) (the determination that final relief of any kind should be ordered means that "[i]n effect, the . . . court must first enter a declaratory judgment" on the merits in favor of the party for whose benefit the relief is ordered). That it is *relief* that is the focus of the Eleventh Amendment bar rather than the simple adjudication of past misconduct is clear from the numerous cases that allow damages to be awarded against state officials personally when they violate federal rights. See *Scheuer* v. *Rhodes*, 416 US 232, 237-238 (1974) (claim for award of damages against state officials personally is not barred by the Eleventh Amendment). In such cases, a finding of past misconduct is necessarily involved. However, the action is not barred by the Eleventh Amendment because the relief, although purely compensatory in nature, has no effect on the state itself.

C. Four Circuit Courts Of Appeal Have Approved Orders For Notice Relief To Remedy Past Violations Of Federal Law Despite The Absence Of Any Injunctive Relief Against Future Violations.

The Courts of Appeal for the Fourth, Fifth, Ninth, and Eleventh Circuits have all approved, on authority of *Quern*, adjudications of past violations of federal law and notice relief to class members affected by those violations despite the absence of any current conflict between federal and state law. See *Randall* v. *Lukhard*, 729 F.2d 966 (4th Cir. 1984) *(en banc)*, *cert. denied*, ___ US ___, 105 S.Ct. 222 (1984); *Silva* v. *Vowell*, 621 F.2d 640 (5th Cir. 1980), *cert. denied sub. nom. Johnston* v. *Silva*, 449 US 1125 (1981); and *Beltran* v. *Myers*, 701 F.2d 91 (9th Cir. 1983), *cert. denied sub. nom. Rank* v. *Beltran*, ___ US ___, 103 S.Ct. 3115 (1983); *Appleyard* v. *Wallace*, 754 F.2d 955 (11th Cir. 1985).[17]

In *Appleyard* v. *Wallace*, *supra*, the Eleventh Circuit considered a case where plaintiffs, suing under 42 USC § 1983, challenged an Alabama Medicaid level-of-care regulation which had barred their admission to nursing homes and appropriate Medicaid eligibility, as violative of the federal Social Security Act and the United States Constitution. While the case was pending, Alabama revised its regulation making it consistent with federal law. Plaintiffs therefore sought no relief with regard to the new regulation, but continued to press their claims for notice relief on behalf of the class that had lost benefits under the old regulation during the period that it was in force (April, 1982, to September, 1983).

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[17] The Second Circuit has not allowed notice relief under the given circumstances but for reasons different from those given below by the Sixth Circuit. See *Colbeth* v. *Wilson*, 707 F.2d 57 (2nd Cir. 1983), affirming 554 F.Supp 539 (D.Vt. 1982).

The Eleventh Circuit reversed the district court's dismissal of plaintiffs' complaint, holding that claims for notice relief for a past period of Medicaid eligibiliy were neither moot nor barred by the Eleventh Amendment, on authority of *Quern* v. *Jordan*, 440 US 332 (1979). The *Appleyard* court specifically rejected the argument that "some actual injunctive, declarative, or other prospective relief, aside from notice relief itself, together with a concomitant determination that the defendants acted illegally, must precede an award of notice relief." See also *infra* this brief, Part II(B). Instead, consistent with the petitioners' views herein and contrary to those of the Sixth Circuit below, the Eleventh Circuit concluded:

> We cannot see any basis upon which to distinguish *Quern* notice from other forms of equitable relief permissible under the Eleventh Amendment. That a claim for injunctive relief becomes moot should not, therefore, moot a separate claim for *Quern* notice. . . . [N]otice relief is not barred by the Eleventh Amendment since the cost of that notice is more properly characterized as ancillary.

754 F.2d at 962-963.

In *Beltran* v. *Myers*, *supra*, California Medicaid applicants challenged, as violative of the Social Security Act, California's transfer-of-assets law under which they would be rendered ineligible if they had transferred property within a certain period of time before their application. The district court and the Ninth Circuit Court of Appeals held the law to be consistent with federal law in effect at that time. See *Dawson* v. *Myers*, 622 F.2d 1304 (9th Cir. 1980). This Court granted certiorari, *Beltran* v. *Myers*, 451 US 625 (1981). While the case was pending in this Court, federal law changed in such a way that it appeared that "in the future the states will be permitted to impose transfer of assets restrictions generally similar to that of

California." *Id.* at 627. Consequently, this Court vacated and remanded the Court of Appeals' decision for reconsideration in light of the federal statutory change. *Id.* at 628-629. Though the *per curiam* opinion of this Court was silent on the issue, four members of the Court, in a separate concurrence, said:

> On remand, the Court of Appeals should, of course, consider the impact of the statutory change on class members' future rights, but it also should determine what relief is appropriate to remedy the past violations. Cf. *Quern* v. *Jordan*, 440 US 332.

Id. at 629.

Following the suggestion in the concurring opinion, the district court in *Beltran* reversed itself on the merits, held that California's transfer-of-assets law violated pre-change federal law, and ordered notice relief on behalf of all applicants who had lost benefits before the federal law change. *Beltran* v. *Myers*, No. 78-2350 CBM(Mx), [1982 Transfer Binder] CCH Medicare and Medicaid Guide ¶ 31,835 (C.D. Cal., Feb. 4, 1982) (lodged with Clerk of the Court). The Ninth Circuit affirmed, *Beltran* v. *Myers*, 701 F.2d 91 (9th Cir. 1983); *cert. denied sub nom. Rank* v. *Beltran*, ___ US ___, 103 S.Ct. 3155 (1983).

In *Randall* v. *Lukhard*, *supra*, The Fourth Circuit considered claims of Medicaid applicants in Virginia who challenged a transfer-of-assets law similar to California's on grounds of its conflict with the same provisions of federal law involved in *Beltran*. Before summary judgment could be sought in the district court, the same federal law change as that involved in *Beltran* ensued. The *en banc* Fourth Circuit held that Virginia's transfer-of-assets rule did not violate *post*-change federal law. However, the Court of Appeals affirmed that portion of the district court's decision that granted declaratory and

notice relief on behalf of applicants who applied for Medicaid before the new federal law went into effect. Certiorari was denied by this Court. ___ US ___, 105 S.Ct. 222 (1984). See also *Simpson* v. *Miller*, 93 F.R.D. 450 (N.D. Ill. 1982) (district court held Illinois child care policy in violation of old federal law and ordered notice relief.)

In *Silva* v. *Vowell*, *supra*, plaintiffs challenged two aspects of Texas' AFDC-IP (Incapacitated Parent) program: a "capable of light work requirement" and a 60-day disability standard. Before judgment could be rendered on the "light work" requirement, it was changed by the defendants to conform to federal law. 621 F.2d at 643, 650. The district court nonetheless ordered notice relief. *Id.* On appeal, the Court of Appeals vacated that portion of the judgment relating to the 60-day disability standard since plaintiffs belonged to the subclass raising the "light work" issue. Consequently, the court remanded the case for intervention by a proper plaintiff affected by the 60-day standard. *Id.* at 649-650. However, the Fifth Circuit held, over an Eleventh Amendment objection, that the "light work" plaintiffs "are still entitled to have an appropriate notice sent to all class members who have been denied benefits because they were capable of light work . . ." *Id.* at 651. Rejecting arguments that notice relief would violate the Eleventh Amendment, the court held that the "notice to this class is well within the prospective-compliance exception referred to in *Milliken*." *Id.* at 653.

II. THE SIXTH CIRCUIT HELD THAT NOTICE RELIEF WAS BARRED FOR TWO REASONS, NEITHER OF WHICH CAN WITHSTAND SCRUTINY.

Despite this Court's holding in *Quern* that an order for notice relief does not violate the Eleventh Amendment, the Sixth Circuit below held that notice relief was barred

in the present case. *Banas* v. *Dempsey*, 742 F.2d 277 (6th Cir. 1984). J.A. at 156. There were two bases for that holding. First, while conceding that an order for notice relief would constitute prospective relief, the Sixth Circuit held that *Cory* v. *White*, 451 US 85 (1981), stands for the proposition that even prospective injunctive relief against state officers is barred by the Eleventh Amendment. *Id.* at 287, 288; J.A. at 175-177. Second, the Sixth Circuit read *Quern* as requiring that, as a prerequisite for any order for notice relief addressed to past violations of federal law, there must be an ongoing injunction against present and future violations. *Id.* Petitioners believe that both these grounds are in error.

A. The Sixth Circuit's Reliance On *Cory* v. *White* Is Misplaced

Petitioners contend that the Sixth Circuit completely misread *Cory* v. *White*, 451 US 85 (1981). *Cory*, of course, correctly held that the Eleventh Amendment "does not bar a suit to enjoin the State itself simply because no money judgment is sought." Id. But *Cory* was an interpleader action based upon diversity of citizenship, and no violation of federal law was ever alleged by the plaintiffs. *Id.* Consequently, *any* judgment rendered in *Cory* would have been a judgment against the "State itself." This is in stark contrast to *Young*, *Edelman*, *Quern* and the present case, all of which involve just such allegations of violation of federal law by defendant state officials. Since a suit against state officials for violation of federal law "is not one against the state," *Pennhurst State School and Hospital* v. *Halderman*, ___ *US* ___ *79 L.Ed.2d 67, 79 (1984)*, *Cory* is simply inapposite.

The *Cory* Court itself pointed out this distinction when it indicated that the plaintiff in *Cory* could not take advan-

tage of the *Edelman* prospective relief exception to the the Eleventh Amendment because *Cory* was a "suit naming a state officer as defendant, but not alleging a violation of . . . federal law." *Id.* at 91. Thus, the *Cory* Court merely reaffirmed the rule that the Eleventh Amendment bars even injunctive suits against state officers *"unless they are alleged to be acting contrary to federal law . . ."* *Id.* (emphasis supplied). Of course, if the Sixth Circuit's reading of *Cory* v. *White* were correct, *Ex Parte Young* would have been overruled.

B. The Language From *Quern* Relied Upon By The Sixth Circuit Affords No Basis For Holding That Notice Relief Is Barred In The Present Case

The Sixth Circuit's second reason why notice relief is barred in the present case is based upon a statement by this Court in *Quern* that:

> The notice approved by the Court of Appeals, unlike that ordered by the District Court, is more properly viewed as ancillary to the prospective relief already ordered by the [district] court. See *Milliken* v. *Bradley*, 433 US at 290.

Quern, 440 US at 349. See *Banas* v. *Dempsey*, 742 F.2d at 286; J.A. at 173. This statement, in the view of the Sixth Circuit, was an indication that, "[t]o escape the bar of the Eleventh Amendment, an order [for notice relief] against state officials must be both 'prospective' *and* ancillary to" an injunction restraining ongoing violations of federal law. *Id.* at 288 (emphasis in original). The Sixth Circuit took the reference to "prospective relief already ordered by the [district] court" in *Jordan* to be a reference to the original permanent injunction against ongoing violations of federal law (entered in 1972). Since in the present case federal law changed before a permanent injunction could be entered, the Sixth Circuit reasoned, the basis for an

order for notice relief "ancillary" to such an injunction did not exist. *Banas* at 288, J.A. at 176. According to the opinion below, without a viable claim that defendant violated federal law *after* that law changed, there could be no basis for an order for notice relief to redress any violation *before* federal law changed. *Id.*

1. The Sixth Circuit's interpretation of the sentence in question is inconsistent both with the remainder of the *Quern* Opinion and with the very sentence being construed.

The Sixth Circuit's interpretation of the sentence quoted from *Quern* is wrong for three reasons. First, the Sixth Circuit's reading is completely contradictory to the remainder of the *Quern* opinion. The only bar to entry of an order for notice relief in the *Jordan* litigation (and in the present case) was the Eleventh Amendment. In other parts of the *Quern* opinion, as discussed *supra* this brief Parts I(B)(2) and I(B)(3), this Court held that an order for notice relief "does not constitute a money judgment" against the state, 440 US at 348 n.20, and "constitutes permissible prospective relief," *id.* at 346-347, and thus does not violate the Eleventh Amendment. If in fact notice relief is not barred by the Eleventh Amendment, then there is no reason to justify its entry as an exercise of the federal court's ancillary powers.[18]

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[18] Under the ancillary jurisdiction doctrine, a district court "may, as an incident to disposition of a matter properly before it, decide other matters raised by the case *of which it could not take cognizance were they independently raised.*" See *Wright*, Law of Federal Courts, § 9 at p. 28 (1983) (emphasis supplied). The problem with reading the *Quern* statement as referring to ancillary jurisdiction is that the Court in *Quern*, in the paragraph immediately preceding the statement in question, had already carefully explained how the district court *had* jurisdiction, despite the Eleventh Amendment, over the "matter" of notice relief. *Quern* v. *Jordan*, 440 US at 348.

The second problem with the Sixth Circuit's interpretation is that, whatever meaning of the term "ancillary" the Sixth Circuit had in mind, it distorts the facts to say that notice relief was in any sense ancillary to the permanent injunction entered in the *Jordan* litigation. In the original *Jordan* lawsuit, the district court entered a preliminary injunction in April, 1971, and declaratory relief and permanent injunctive relief in March, 1972. Thus, all class members who applied for AABD after April, 1971, had their applications processed in accord with federal regulations. Because these class members were protected by the injunction, they lost no benefits, and had no need for notice relief.

The only class members who lost benefits and who therefore could pursue state remedies in response to notice relief were those AABD applicants who applied for benefits between July 1, 1968, and the date of the preliminary injunction. See *Jordan* v. *Trainor*, 405 F.Supp 802, 803 (N.D. Ill. 1975). Where the only class members who sought notice relief, and who would benefit from it, were those *excluded* from the terms of the permanent injunction, it makes no sense to say that the notice relief entered on *their* behalf was "ancillary" to the permanent injunction. Any logical connection is stretched even further when one realizes that, at the time that notice relief was requested and granted in 1975, the entire AABD program had already been defunct for over a year, and by the time this Court approved notice relief in 1979, the district court's injunction had been moot for five years. See *Quern* v. *Jordan*, 440 US at 348, n.20. Thus, in the *Jordan* litigation, as in the present case, there simply *was* no permanent injunction that covered (or determined the rights of) the class members seeking notice relief.

The third problem with the Sixth Circuit's interpretation is that it misreads the introductory phrase of the very

sentence being construed. That phrase limits the sentence's significance to a perceived difference between "[t]he notice approved by the Court of Appeals" and the "notice . . . ordered by the District Court." The only dispute between the *en banc* Seventh Circuit and the district court in *Quern* was over the *content* of the notice itself—not about the propriety of entering an order for *some* form of notice relief. See *Jordan* v. *Trainor*, 563 F.2d 873, 875 (7th Cir. 1977) (*en banc*). The Sixth Circuit, however, by interpreting the sentence to require an injunction against future violations as "the foundation . . . to support a notice *order*," *Banas*, 742 F.2d at 287, J.A. at 174 (emphasis supplied), viewed the passage as questioning whether *either* court below in *Quern* had the power to order *any* form of notice relief. If this were the true meaning then the sentence would not make sense—clearly the district court's *order* for notice relief was no more or less "ancillary" to other relief than was the Court of Appeal's *order*. Indeed, there was no dispute between the two courts or between those courts and this Court in *Quern* on the power to enter *some form* of notice relief. The only dispute was over the content of the notice to be sent.

The Sixth Circuit's error becomes apparent when the text of the quoted sentence is looked at more carefully. The subject of the quoted sentence is not "the district court's order" or "the Court of Appeals' order," but rather the subject is "*the notice*" itself. When the correct subject is inserted, so that this Court's comparison is limited to the content of the respective notices, and not to the *orders* for relief, then the meaning of the term "ancillary" becomes clear, as will be shown below.

2. The term "ancillary," as used in *Quern*, refers to the fiscal impact of relief.

The only possible meaning of the term "ancillary" as used in the sentence in question is the special sense that it

has in Eleventh Amendment jurisprudence: to describe the permissible "effect on the state treasury" of compliance with prospective relief. *Edelman*, 415 US at 668. As applied in *Edelman* and *Milliken II*, the financial impact of relief that is "a necessary consequence of compliance in the future with a substantive federal question determination," is "ancillary" to that determination. *Edelman*, *id.*; *Milliken II*, 433 US at 289. See also *Hutto* v. *Finney*, 457 US 678, 691 n.17 (1978) (justifying the fiscal impact of an attorney fee award and stating that the "cost of compliance is 'ancillary' to" prospective relief); *id.* at 690 n.15 (describing the "'[a]ncillary' cost" of compliance with the prospective order for compensatory education programs in *Milliken II*).[19]

There is ample evidence that this was the intended meaning of "ancillary" in *Quern*. The *Quern* opinion cites—for the very proposition stated in the sentence in question—the Eleventh Amendment discussion in *Milliken II* concerning the cost of "prospective compliance" with the remedial desegregation orders. See *Quern*, 440 US at 349 (quoted *supra* this brief at 32). In the only other place in the *Quern* opinion that the term "ancillary" appears, it is used in precisely this sense. See *id.* at 337 (citing *Ex Parte Young* for the proposition that "[a] federal court . . . may enjoin state officials . . . even though such an injunction has an ancillary effect on the state treasury.") Further, as discussed below more completely, reading the term as a reference to the differing *effect* of the notice issued by the district court and the

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[19] Ancillary, then, as used in the Eleventh Amendment sense, simply describes the effect of permissible prospective relief. While in *Jordan* notice relief in fact supplemented (moot) nondeclaratory relief previously granted to a sub-class of plaintiffs, the Sixth Circuit has taken what happened to be true in that case and elevated it to a constitutional requirement.

modified notice issued by the Court of Appeals fully accounts for the introductory phrase, since it was precisely a difference in financial impact that distinguished the two notice forms.

When the Eleventh Amendment meaning of ancillary is inserted, the sentence becomes intelligible and consistent with the remainder of the *Quern* opinion. The first effect of applying the Eleventh Amendment meaning is that it makes clear what "prospective relief already ordered" that the impact (of the Court of Appeals' notice, but not that of the district court) was "ancillary to." As discussed above, *Edelman* and *Milliken II* indicate that ancillary costs are those that are a "necessary consequence of compliance in the future with a *substantive federal question determination.*" *Edelman*, 415 US at 668; *Milliken II*, 433 US at 289 (emphasis supplied). Using the Eleventh Amendment sense of the term "ancillary," it is clear that the only substantive federal question determination to which the impact of notice could be ancillary was the original declaratory judgment holding that Illinois officials had violated federal law from 1968 to 1972—a finding left undisturbed by any of the appellate courts throughout the course of the litigation. The burden of dealing with state administrative claims for lost benefits and possibly paying those claims, if required by state law, *is* "a necessary consequence of compliance in the future with [the] substantive federal question determination" that the state regulations violated federal law during that period. Since the only substantive federal question determination that applied to the class getting notice was the 1972 declaratory judgment, this Court's reference to "prospective relief already ordered" in the quoted sentence must be to that declaratory relief.[20]

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[20] For the proposition that such a declaration of past misconduct constitutes prospective relief, see *supra* this brief Part I(B)(3).

The point is made more emphatically by examining the Sixth Circuit's conclusion that the "prospective relief already ordered" by the *Jordan* district court referred to the permanent injunction. The only substantive federal question determinations necessarily implicated by the permanent injunction entered in *Jordan* were that Illinois law violated federal law from March 15, 1972 (the date of judgment) *forward* and that state officials were required to process all AABD applications received *after that date* in accord with federal law. See *Jordan* v. *Weaver*, No. 70 C 71, Judgment, (ND Ill. March 15, 1972), Appendix to this brief at 4a. The "necessary consequence[s] of compliance in the future with," and therefore the ancillary effect of, these determinations were simply the ones that are spelled out in the injunction—earlier processing and payment of "new" AABD applications filed by *future* applicants. It makes little sense to say that a "necessary consequence of compliance with" *these* determinations would have included required notification of a completely different group of *past* applicants and the processing of any administrative claims filed by them in response to notices.[21]

Describing the effect of notice relief as ancillary to the permanent injunction against future violations makes even less sense when one remembers that, one year before the district court ordered notice relief and four

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[21] In addition, it is doubtful that determinations limited to a finding of a violation of federal law *after* the date of judgment could serve as a basis for an order for notice relief to class members who lost benefits *before* the date of judgment. Though the equitable powers of the federal court are indeed broad, see *Swann* v. *Charlotte Mecklinberg Board of Education*, 402 US 1, 15 (1971), relief ordered by the federal court may not exceed the scope of the violation of federal law found by that court. See n. 16, *supra*.

years before this Court's opinion in *Quern*, the AABD program was abolished, thereby completely nullifying the injunction's prospective effect. After the abolition of the AABD program, there could no longer be *any* "necessary consequence[s] of compliance in the future with" the permanent injunction, let alone the particular ancillary effects of notice relief of concern to the Court in *Quern*.

The second result of applying the Eleventh Amendment meaning of "ancillary" to the sentence in question is that it demonstrates clearly how the effect of the district court notice was *not* ancillary to the relevant declaration of illegality, while the effect of the Court of Appeals notice *was*. If nothing else is clear from *Quern*, it is that to avoid the Eleventh Amendment bar, ultimate liability for retroactive benefits must be left to *state* agencies and courts following *state* law. See *Quern*, 440 U.S. at 347-348, quoted in relevant part *supra* this brief in Part II(B)(2). Not coincidentally, it was precisely this issue that led to the conflict between the *Jordan* district court and the *en banc* Seventh Circuit regarding the content of the notice. The district court notice stated in relevant part that "you were denied public assistance to which you were entitled in the amount of $____" and the notice of appeal returnable by the class member stated that "[t]he department . . . denied me benefits to which I was and am entitled." See *Jordan* v. *Trainor*, 563 F.2d 873, 875 (7th Cir. 1977) *(en banc)*.The wording of these forms, according to the Seventh Circuit, "compelled" an "admission" of state liability for lost benefits in a particular amount. *Id.* Such a "federal predetermination of state liability" constituted "a type of money judgment against the state." *Id.* After removal of this objectionable content from the forms, the Court of Appeals' version only required that the state *consider* claims for retroactive benefits, thus allowing the state to

make its own determinations of liability for the lost benefits. See *id.* at 876.

The effect of the district court notice—imposed liability for retroactive benefits in a particular amount—was not a "necessary consequence of compliance in the future" with the declaration of illegality, because strict compliance with that declaration could be had without a determination of ultimate liability.[22] In other words, the district court notice compelled "consequences" beyond those that could reasonably be considered "ancillary" to the declaratory relief entered earlier. The Court of Appeals' notice, on the other hand, only required that the state *consider* claims of class members for retroactive benefits under established state procedures. The burden of holding hearings and making adjudications was properly viewed as ancillary to the declaratory judgment because "a necessary consequence" for state officials who fail to pay benefits required to be paid by federal law, is that they will be faced with administrative claims for retroactive benefits.[23]

Understood in the above light, the *Quern* sentence in question supports rather than defeats the relief sought by petitioners below. The relief requested was precisely the same modified notice approved by the *en banc* Court of Appeals and by this Court in *Quern*. The effect of sending the requested notice—a requirement that the state determine its own liability on any claims class members choose

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[22] The two defenses to liability proffered by state officials in *Quern* were both bases for denial of liability that would not have transgressed the declaratory judgment. See *Quern*, 440 US at 348 n.20. See also *supra* this brief at n.12.

[23] See Part I(B)(3), *supra*, discussing the duty of state welfare officials when underpayments of aid are identified.

to file in response to the notice—would be ancillary to the declaratory judgment, also requested below, that respondent's regulations violated federal law before October 1, 1981. This determination of past illegality would have prospective or future effect because both Michigan and federal law require that future claims for lost benefits be adjudicated in accord with valid eligibility regulations in effect at the time that the losses were incurred. See *supra* this brief, n.11 and accompanying text.

Of the four other Circuit Courts of Appeal that have allowed notice relief in the same circumstances as the present case (see cases and discussion *supra* this brief Part I(C), two have had occasion to discuss the meaning of the sentence in question from *Quern*.

In *Appleyard* v. *Wallace*, 754 F.2d 955 (11th Cir. 1984), the Court of Appeals rejected the argument that "the word 'ancillary' in *Quern* goes beyond its meaning in *Edelman*, in which the Court referred to the costs to the state treasuries of complying with prospective orders as a permissible 'ancillary effect'." *Id.* at 691. The court then rejected the conclusion "that some actual injunctive, declarative, or other prospective relief, aside from the notice itself, together with a concomitant determination that the defendants acted illegally, precede an award of notice relief," *id.* at 962, and ordered notice relief.

Similarly, the Fifth Circuit in *Silva* v. *Vowell*, 621 F.2d 640 (5th Cir. 1980) *cert. denied* 449 US 1125 (1981), was faced with the argument that the cost to the state of actually preparing and sending the notices rendered the order for notice relief violative of the Eleventh Amendment. The court rejected the contention. It read the term "ancillary" as used in *Quern* to refer to the costs of complying with the notice relief order, including the direct

costs of actually preparing and sending the notice. *Id.* at 652-653.

In summary, because the notices in the case at bar will have no direct fiscal effect on Michigan's treasury, and because any fiscal effect will be a necessary consequence of future compliance with the federal question determination inherent in notice relief (the declaratory judgment), notice relief here is no more barred by the Eleventh Amendment than it was in *Quern*. The Sixth Circuit erred by holding that an order for notice relief is barred by the Eleventh Amendment unless it is "ancillary" to a permanent injunction, and the decision of the Court of Appeals should therefore be reversed.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case should be remanded with the directions that declaratory and notice relief are not barred by the Eleventh Amendment, and may be entered if petitioners prevail on the merits of their motion for summary judgment.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 71 C 70

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually and on behalf of all other persons similary situated,
Plaintiffs,

vs.

HAROLD O. SWANK, Director, Illinois Department of Public Aid; DAVID DANIEL, Director, Cook County Department of Public Aid; EDWARD J. BARRETT, Comptroller of Cook County, individually and in their official capacities,
Defendants.

MEMORANDUM OPINION AND ORDER

This civil rights action challenges the administration of federally funded Aid to the Aged, Blind and Disabled program (AAPD) by the defendants. Currently, the plaintiff has moved for summary judgment seeking a permanent injunction, declaratory judgment, and punitive damages. Plaintiff argues and the court agrees that there exists no genuine issue of material fact.

Section 1382(a)(8) of Title 42 provides that assistance under the AABD plan shall be made to eligible applicants with reasonable promptness. Federal regulations stipulate that reasonable promptness shall not exceed 30 days for aid to the aged and blind and 60 days for the disabled. These time limitations are mandatory. *Rodriquez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970) (Kiley, Will and Decker, JJ). The defendants,

as administrators of the Illinois program, have not complied with these limits, either for determining eligibility or in furnishing the first assistance check. Federal Handbook of Public Assistance Administration, Part IV, §§ 2200(b)(3)(4) and 2300(b)(3)(5). For the reasons stated by plaintiff in his memorandum, the court agrees that the plaintiff class is entitled as a matter of law to a permanent injunction to insure compliance, present and future, with the requisite time limitations.

Based on the same authority a final judgment will be entered declaring the Illinois Categorical Assistance Manual sections 4004 and 8255 (and subsections thereunder) as applied to applicants for AABD to be invalid insofar as they are inconsistent with the Social Security Act and regulations issued pursuant thereto.

Plaintiff also seeks punitive damages against defendant Swank, who was the Director of the Illinois program. The court is not inclined to grant such damages, believing the permanent injunction to be a sufficient deterrent to future violations.

Finally, a final judgment and permanent injunction is sought requiring defendants to pay to those applicants for AABD since July 1, 1968, who met the eligibility requirements for AABD at the time of their applications, AABD benefits from the date of their application. Based on the *Rodriquez* case and other authority cited by plaintiff, the class is entitled to such payments at least from the last day of the requisite time limitations contained within the federal regulations. The class consists of those applicants who applied for AABD since the effective date of the regulations, July 1, 1968, and did not receive their initial check as required within the 30 day or 45 day (60 days for aid to the disabled as of January 1, 1971) limits. *Lewis* v. *Riggins*, ____ F. Supp. ____ (Cause No. 71 H 19, N.D. Ind. May 19, 1971).

Plaintiff, however, seeks the retroactive payments from the date of application rather than the last day of the time limitation. The court cannot agree with this position. The federal statute and regulations grant a reasonable time to the admin-

istrators to act upon the application and require payments to begin only within that period but not from the beginning of such period. This court perceives no requirement that the assistance shall be paid retroactively to the date of application. Nor is the right to the equal protection of the law violated by such an order. The processing of some applications faster than others within the time limits does not establish arbitrary classifications constituting invidious discrimination. No classifications will be processed before others. As long as all are completed and assistance checks are furnished within the time limits, a definite and objective standard exists for the processing of the applications. Therefore, the plaintiff class is entitled to retroactive benefits from the last day of the federally required time limits.

Accordingly, plaintiff's motion for summary judgment is granted in part and denied in part. Counsel for plaintiff is ordered to present to the court within 20 days a proposed judgment order and decree in accordance with this opinion.

ENTER:

/s/Alexander J. Napoli
ALEXANDER J. NAPOLI
UNITED STATES DISTRICT JUDGE

DATED: February 4, 1972

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

No. 71 C 70

JOHN JORDAN, by his next friend,
JEANETTE BRYANT, individually and
on behalf of all other persons similary situated,
Plaintiffs,

vs.

EDWARD T. WEAVER, Director,
Illinois Department of Public
Aid; HAROLD O. SWANK, former
Director, Illinois Department
of Public Aid; DAVID L. DANIEL,
Director, Cook County, Department
of Public Aid; EDWARD J.
BARRETT Comptroller of Cook
County, individually and in
their official capacities,
Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Alexander J. Napoli, United States District Court, and the issues having been duly heard and a Memorandum Opinion and Order having been duly rendered on February 4, 1972.

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. The defendants DAVID L. DANIEL, Director, Cook County Department of Public Aid, and EDWARD J. BARRETT, Comptroller of Cook County, and EDWARD T. WEAVER, Director, Illinois Department of Public Aid, their agents, including all of the County Departments of Public Aid in the State of Illinois, their employees, and all persons in active concert and participation with them, are hereby permanently enjoined from failing to make determinations of eli-

gibility and mailing either the first full AABD assistance check or notification of denial of assistance, within thirty days from the date of application as to applicants for aid to the aged and blind under the AABD program in the State of Illinois, and within sixty days from the date of application as to applicants for aid to the disabled under the AABD program in the State of Illinois, except as provided in paragraph 3, infra.

2. The entitlement of all eligible AABD applicants in the State of Illinois shall attach no later than the thirtieth (30th) day from the date of application as to aged and blind applicants, and no later than the sixtieth (60th) day from the date of application as to disabled applicants. In any case in which eligibility is determined subsequent to the thirtieth day or sixtieth day, respectively, the applicant shall be entitled to AABD assistance retroactive at the very least to the thirtieth (30th) day or sixtieth (60th) day, respectively, subject only to the exception in paragraph 3, infra. If the applicant is denied AABD assistance retroactive to the thirtieth (30th) or sixtieth (60th) day, respectively, pursuant to paragraph 3, infra, said applicant must receive a written statement explaining (a) the unusual circumstances, referred to in paragraph (a) the unusual circumstances, referred to in paragraph 3, upon which the denial is based, and (b) that the applicant has the right to appeal within sixty (60) days this decision of the County Department of Public Aid.

3. The thirty-day requirement as defined in paragraphs 1 and 2 and in 45 C.F.R. §206.10(a) (36 Fed.Reg. 3864, February 29, 1972) shall be strictly complied with except in unusual circumstances, e.g., where the agency cannot reach a decision because of failure or delay on the part of the applicant or an examining physician, or because of some administrative or other emergency that could not be controlled by the agency, in which instances the case record shows the cause for the delay.

4. Illinois Categorical Assistance Manual, Section 4004, and subsections thereunder, as applied to applicants for AABD are invalid insofar as they are inconsistent with the requirements of paragraphs 1 and 2, supra.

5. That the defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, his agents, including all of the County Departments of Public Aid in the State of Illinois, and employees, and all persons in active concert and participation with them, are hereby enjoined to release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968 and April 16, 1972 [sic] [should read "1971"], and were determined eligible, as follows:

"(a) For those aged and blind applicants whose first full AABD check was not mailed within thirty days from the date of application, AABD assistance for the period beginning with the thirtieth day from the date of application to the date the applicant's entitlement to AABD became effective;

"(b)(i) For those disabled applicants who applied between July 1, 1968 and December 31, 1970, whose first full AABD check was not mailed within forty-five days from the date of application, AABD assistance for the period beginning with the forty-fifth day from the date of application to the date the applicant's entitlement became effective;

"(ii) For those disabled applicants who applied between January 1, 1971 and April 16, 1971, whose first full AABD check was not mailed within sixty days from the date of application, AABD assistance for the period beginning with the sixtieth day from the date of application to the date the applicant's entitlement became effective.

"These AABD benefits shall be mailed to those persons currently receiving AABD within eight months with an explanatory letter, said letter having been approved by plaintiffs' attorney. Any AABD benefits received pursuant to this paragraph shall not be deemed income or resources under Article III of the Illinois Public Aid Code.

For those persons not presently receiving AABD:

(a) A certified letter (return receipt requested), said letter having been first approved by plaintiffs' attorney, shall be sent to the last known address of the person,

informing him in concise and easily understandable terms that he is entitled to a specified amount of AABD benefits wrongfully withheld, and that he may claim such amount by contacting the County Department of Public Aid at a specified address, within 5 days from the receipt of said letter.

(b) If the County Department of Public Aid does not receive a claim for the AABD benefits within 45 days from the date of actual notice to the person, the right to said AABD benefits shall be forfeited and the file shall be closed. Persons who do not receive actual notice do not forfeit their rights to AABD benefits wrongfully withheld under this provision.

6. Within 15 days from the date of this decree, defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, shall submit to the Court and the plaintiffs' attorney a detailed statement as to the method for effectuating the relief required by paragraph 45, supra, of this Decree. Any disputes between the parties as to whether the procedures and steps outlined by the defendant WEAVER will fulfill the requirements of this Decree will be resolved by the Court.

7. The defendants shall have the continuing obligation to submit to the Court and to the plaintiffs' attorney a detailed monthly report indicating the number of AABD applications disposed of by length of time from the date of application, for each county in the State of Illinois, and such other information which accurately reflects the time for processing AABD applications, until such time that such reports establish compliance with the terms of this order for six months.

8. Defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, shall issue a bulletin of the Illinois Department of Public Aid incorporating the essence of this judgment within 15 days from the entry thereof.

9. This judgment shall be binding upon defendants, their officers, agents, servants, employees and their successors, and upon those persons in active concert or participation with them who receive actual notice of the judgment by personal service or otherwise.

10. The prayer of the plaintiffs for punitive damages against the defendant HAROLD O. SWANK is hereby denied.

11. This Court shall retain continuing jurisdiction over this cause for all purposes.

ENTER:

/s/ALEXANDER J. NAPOLI
Alexander J. Napoli, Judge
United States District Court

Dated: March 15, 1972

Office-Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-6270

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHNNY GREEN, GAIL BLESSING, THERESA E. COVEYOU, GILDA MILLS, and JUDGE MILLS on behalf of themselves, their children, and all others similarly situated,

Petitioners,

v

AGNES MARY MANSOUR, in her official capacity as Director of the Michigan Department of Social Services,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

In a lawsuit against a state official under 42 U.S.C. § 1983, in which there is no live allegation of current violation of federal law and where no permanent injunctive relief restraining current or future conduct is possible, does the Eleventh Amendment prohibit notice relief and declaratory relief?

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the constitutional provision set forth in Petitioners' Brief, the following constitutional, statutory and regulatory provisions are also involved in this case. Relevant portions of these provisions are set forth in the Appendix to this Brief, beginning on page 10a.

United States Constitution, Article III, § 2, Cl. 1

28 U.S.C. § 2201

M.C.L.A. 400.37; M.S.A. 16.437

45 C.F.R. 205.10(a)(3), (4) and (5)

No. 84-6270

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHNNY GREEN, GAIL BLESSING, THERESA E. COVEYOU, GILDA MILLS, and JUDGE MILLS on behalf of themselves, their children, and all others similarly situated,

Petitioners,

v

AGNES MARY MANSOUR, in her official capacity as Director of the Michigan Department of Social Services,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This cause consists of two cases consolidated on appeal to the Sixth Circuit Court of Appeals, *Michigan Welfare Rights Organization* (MWRO) v. *Dempsey* and *Banas* v. *Dempsey*. Because the Petitioners' Statement of the Case is incomplete, misleading and contains numerous legal conclusions not supported by the record below, the Respondent presents its own Statement of the Case.

A. **MWRO v. Dempsey**

This action was filed in the U.S. District Court for the Eastern District of Michigan on April 11, 1980, (J.A. 49) challenging certain policies of the Michigan Department of Social Services (MDSS) relating to the provision of day care benefits for employed recipients of Aid to Families with Dependent Children (AFDC). The Complaint alleged that, in calculating the AFDC grant for employed AFDC recipients, the Michigan Department of Social Services wrongfully refused to deduct from the recipient's income certain child care costs, allegedly in violation of Title IV-A of the Social Security Act, 42 U.S.C. 601 *et seq.* and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution. Petitioners sought class certification, a declaratory judgment that the Respondent's policies and practices violated the Social Security Act and the Constitution, injunctive relief to prevent Respondent from continuing to enforce the challenged actions, notification to all class members of their rights to obtain an administrative hearing, and attorneys fees. (J.A. 53-65)

The challenged policy authorized payment for child care expenses, up to certain maximums, through the Title XX program, 42 U.S.C. 1397 *et seq*, for which all AFDC recipients qualified. Respondent denied that the policy violated either the Social Security Act or the Constitution. (J.A. 73-83)

Effective October 1, 1981, via the Omnibus Budget Reconciliation Act of 1981 (OBRA), P.L. 97-35, 95 Stat, 357, 933 (1981), Congress amended 42 U.S.C. 602(a)(7) and (8) by specifically setting limits on the amount of day care expenses which could be disregarded from earned income. The Michigan Department of Social Services implemented policies consistent with these amended provisions, effective October 1, 1981. (J.A. 139)

On February 9, 1982, Petitioners moved for class certification and summary judgment on the merits of their claim that Respondent's policies violated the pre-October 1, 1981 Social Security Act. They also sought an order against Respondent requiring the issuance of a notice similar to the one approved by this Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979). (R. 33A, 36) On February 9, 1982, Respondent moved to dismiss the action, claiming that the October 1, 1981 OBRA amendments rendered Petitioners' pre-October 1, 1981 claims for injunctive relief moot and that the Eleventh Amendment barred any other relief, including an order requiring the issuance of a "*Quern*-type" notice to persons who had lost benefits as a result of Respondent's policies under the old statute. (R. 34)

Petitioners made no claim that the State's post-October 1, 1981 policies or procedures regarding the treatment of child care expenses violated either the post-October 1, 1981 Social Security Act or the Constitution. Petitioners' counsel admitted, at oral argument on their motions for summary judgment on March 9, 1982, that the claims for declaratory and notice relief related only to benefits allegedly lost prior to October 1, 1981. (J.A. 151)

On June 22, 1982, the District Court issued its Order denying Petitioners' motions for summary judgment and class certification and granting Respondent's motion to dismiss the action. (J.A. 141-147)

B. **Banas** v. **Dempsey**

This case was filed on May 11, 1981, challenging the Department of Social Services' consideration of stepparent income in determining AFDC eligibility. (J.A. 4-14) Federal regulations at that time authorized states to consider step-

parent income where the stepparent "is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children." 45 C.F.R. 233.90(a)(1) (1980).

In 1980, Michigan's "Poor Law," Michigan Compiled Laws Annotated (hereinafter M.C.L.A.) 401.2; Michigan Statutes Annotated (hereinafter M.S.A.) 16.122, was amended to include a "stepparent living in the same household", along with "the father and mother" as persons who were responsible for the support and maintenance of dependent children. On March 1, 1981, the Department of Social Services amended its AFDC policy in accordance with the amended Poor Law to include consideration of stepparent income in determining AFDC eligibility. (J.A. 19)

Petitioners alleged that the Poor Law amendment was not a law of general applicability which imposed a support obligation to the same extent as that for natural or adoptive parents and, therefore, the policy of applying the Poor Law violated Title IV-A of the Social Security Act, 42 U.S.C. 601 *et seq* and the federal regulation promulgated thereunder. Petitioners also alleged that the State's policy violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Petitioners' constitutional rights of privacy and free association. The Department of Social Services denied that its policy was in violation of either the Social Security Act, 45 C.F.R. 233.90(a)(1), or the Constitution. (J.A. 4-14)

Petitioners sought class certification, a declaratory judgment that the state's policies and practices violated the Social Security Act and the Constitution, injunctive relief to prevent the state from continuing to enforce the challenged policies and practices, notification to class members of their rights to an administrative hearing, and attorneys' fees. (J.A. 13-14)

On May 28, 1981, Petitioners filed a Motion for Preliminary Injunction to enjoin Respondent from enforcing the challenged stepparent income policy during the pendency of the lawsuit. (R. 3) A preliminary injunction was granted on June 29, 1981, which was appealed to the Sixth Circuit Court of Appeals. (J.A. 25-27, R. 13) Before the appeal from the District Court's preliminary injunction could be heard, Congress amended 42 U.S.C. 602(a) to provide that, effective October 1, 1981, income of stepparents living in the same household as the AFDC recipient shall be counted for purposes of determining eligibility. 42 U.S.C. 602(a)(31). Thus, there was no longer any federal requirement that a stepparent's support obligation be founded upon state law. Accordingly, the parties stipulated to an amendment of the preliminary injunction order, making its prospective effect valid only to October 1, 1981. (J.A. 33-35) On October 27, 1981, Respondent voluntarily dismissed the appeal of the preliminary injunction order. (R. 22)

On March 19, 1982, Respondent filed a motion to dismiss the action, contending that the Petitioners' claims were mooted by the amendment to the Social Security Act and that the Eleventh Amendment was a bar to the issuance of any order sought by Petitioners. (R. 27) On April 9, 1982, Petitioners filed a motion for summary judgment, seeking a declaration that the state's pre-October 1, 1981 policies violated the pre-October 1, 1981 Social Security Act and seeking an order for issuance of a "*Quern*-type" notice. (R. 29) Petitioners admitted at a hearing conducted on April 13, 1982, that their claims for injunctive relief after October 1, 1981 were mooted by the amendment to 42 U.S.C. 602(a). (J.A. 150-151)

On January 22, 1982, the District Court denied Petitioners' motions for summary judgment and class certification and granted Respondent's motion to dismiss the action. (J.A. 36-44)

The Plaintiffs in *Banas* v. *Dempsey* and *MWRO* v. *Dempsey* filed a joint appeal to the Sixth Circuit Court of Appeals. On August 24, 1984, the Court of Appeals issued its decision, affirming the District Court's decisions in both *Banas* and *MWRO*. *Banas* v. *Dempsey*, 742 F.2d 277 (6th Cir., 1984). The Court of Appeals held that after October 1, 1981, the Plaintiffs' claims for prospective injunctive relief became moot and that the Eleventh Amendment to the United States Constitution barred the court from awarding any relief regarding the Defendant's pre-October 1, 1981 policies and procedures.

Petitioners filed a motion for rehearing *en banc* which was denied by the Court of Appeals on October 18, 1984.

On January 16, 1985, the Petitioners filed a Petition for Writ of Certiorari. The only question presented is whether the Eleventh Amendment bars an order for notice relief to remedy past violations of federal law when, as a result of a change in federal law, no injunctive relief is sought concerning the state's current application of federal law. The Petitioners make no claim that, after October 1, 1981, the Respondent has violated any federal or constitutional law either with respect to the Department's child care expense policies or stepparent income policy.

A Writ of Certiorari was granted by this Court on April 1, 1985.

SUMMARY OF ARGUMENT

In the absence of any final injunctive or declaratory relief prohibiting ongoing or future violations of federal law, the Eleventh Amendment bars retroactive declaratory and notice relief against a state official. The only relief not barred by the Eleventh Amendment is prospective injunctive relief and non-prospective relief which is merely ancillary to prospective

relief already ordered by the District Court. Because there was no final prospective injunctive or declaratory relief ordered in either of the instant cases, the relief sought by the Petitioners is not ancillary relief.

Because the notice relief sought by the Petitioners here is not ancillary to prospective injunctive relief, it did not constitute the type of relief approved by this Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979), as permissible under the Eleventh Amendment. In addition, the retroactive declaratory relief sought against the state officials would, in effect, constitute a liability against the state which would impermissibly impact upon the State treasury in conflict with the Eleventh Amendment, as interpreted in *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

Moreover, the relief sought also was inappropriate because there were no state administrative remedies available to any of the Petitioners or the proposed class members at the time they sought such relief. Pursuant to 45 C.F.R. 205.10(a)(5)(iii), all administrative remedies regarding disputed welfare claims must be requested within 90 days of the State agency's action denying benefits. Here, any allegedly illegal action ceased with the federal amendments to the Social Security Act, effective October 1, 1981. Summary judgment was not sought until more than 90 days after the statutory change. Petitioners never requested notice of judicial, as opposed to administrative, remedies and, in any case, no such remedies existed due to state law. Thus, the notice relief sought is both incorrect and pointless. Since no state or federal remedies exist, no case or controversy exists with respect to Petitioners' request for declaratory relief regarding the alleged past violations of federal law.

ARGUMENT

I.

WHERE, DUE TO CHANGE IN FEDERAL LAW, THERE IS NO ALLEGATION OF CURRENT VIOLATIONS, THE ELEVENTH AMENDMENT PROHIBITS NOTICE RELIEF AND DECLARATORY RELIEF REGARDING PRIOR POLICIES.

A. The Eleventh Amendment Prohibits Notice Relief Where No Prospective Injunctive Relief Is Possible.

The Petitioners concede that after the effective date of OBRA on October 1, 1981, they no longer had a claim that the Respondent was currently in violation of the Social Security Act or any other federal requirement, either with respect to the treatment of stepparent income or day care expenses. At the time the District Court dismissed the two lawsuits on June 22, 1982, no final declaratory judgment had been rendered regarding the legality of the Respondent's policies or practices prior to October 1, 1981. In *Banas* v. *Dempsey*, a preliminary injunction entered on June 29, 1981, was amended, through the stipulation of the parties, on October 21, 1981, making the order effective only to October 1, 1981. In any case, a preliminary injunction is not a final determination on the merits. See *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1980).

In *MWRO* v. *Dempsey*, and *Banas* v. *Dempsey*, the Petitioners sought, and were denied, a judgment declaring the Respondent's pre-October 1, 1981 policies regarding stepparent income and child care expenses to be in violation of the Social Security Act, and requiring the Respondent to notify AFDC recipients of the existence of administrative procedures where-

by they might have their eligibility for back benefits determined. The District Court held in both cases, and the Court of Appeals affirmed, that the Eleventh Amendment barred the issuance of such relief to a proposed class of plaintiffs where no prospective injunctive relief regarding any ongoing federal violation was ordered or available. Although the Petitioners acknowledged that, after October 1, 1981, because of the amendments to the Social Security Act, no prospective injunctive relief was appropriate in these cases, the Petitioners nevertheless contend that such injunctive relief is not constitutionally required before a federal court may order a state defendant to issue such a notice to a proposed (although uncertified) class of plaintiffs.

The Petitioners' argument is premised upon their incorrect interpretation of this Court's decision in *Quern* v. *Jordan*, 440 U.S. 332 (1979). In *Quern* v. *Jordan*, the director of the Illinois state welfare department sought reversal of a Court of Appeals ruling (*Jordan* v. *Trainor*, 563 F.2d 873 (7th Cir., 1977)), which held that, under the circumstances of that case, an order directing "state officials to send a mere explanatory notice to members of the plaintiff class advising them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits" did not violate the Eleventh Amendment restrictions on federal lawsuits brought against state officials by citizens of such state. 440 U.S. at 338.

The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

In *Hans* v. *Louisiana*, 134 U.S. 1 (1890), this Court held that the Eleventh Amendment barred suits brought by a citizen against his own state as well as against another state. The Eleventh Amendment prohibition has been applied regardless of whether the relief sought is legal or equitable in nature. See *Missouri* v. *Fiske*, 290 U.S. 18, 27 (1930), *Cory* v. *White*, 457 U.S. 85, 91 (1982). The Eleventh Amendment bars actions against a State, even though individual officials are nominal defendants. *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945). A limited exception to the prohibition was created in *Ex parte Young*, 209 U.S. 123 (1908), in which the Court held that the Eleventh Amendment did not bar a suit in federal court to enjoin a state official from enforcing an allegedly unconstitutional state statute. The *Young* case dealt only with prospective injunctive relief. As this Court recently emphasized in *Pennhurst State School and Hospital* v. *Halderman*, —— U.S. ——; 104 S. Ct. 900; 79 L. Ed. 2d 77, 80 (1984): "The theory of *Young* has not been provided an expansive interpretation." In interpreting *Ex parte Young*, *supra*, this court said in *Edelman* v. *Jordan*, 415 U.S. 651, 676 (1974), that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to *prospective* injunctive relief. . ." (Emphasis added). In *Milliken* v. *Bradley*, 433 U.S. 267, 287 (1977), the court also emphasized that the exception created in *Ex parte Young*, *supra*, pertained to "compliance *in the future* with a substantive federal-question determination. . ." (Emphasis in original). The court in *Milliken* characterized the *Young* exception as the "prospective-compliance exception" to the Eleventh Amendment. *Id.* at 289.

In *Hutto* v. *Finney*, 437 U.S. 678 (1978), this Court held that an order awarding attorneys' fees against a state official was not barred by the Eleventh Amendment because it was an order which was "'ancillary' to the prospective order enforcing federal law." *Id.* at 690. The Court analogized the attorneys' fee ordered in *Hutto* to a fine for civil contempt

and explained that the power to impose such a fine was "properly treated as ancillary to the federal court's power to impose injunctive relief." *Id.* at 691. The Court also explained that under the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 42 U.S.C. 1988, attorneys' fees could be imposed against the losing party as a part of "costs" and that such costs were not barred by the Eleventh Amendment because they were ancillary to prospective relief which the court would have already ordered. The Court explained:

> ". . .*only prospective relief can be successfully pursued by an individual in a suit against a State*. . . ." (Emphasis added) *Id.* at 695, n. 24.

Thus, in *Hutto*, this Court reiterated its interpretation of the Eleventh Amendment that only *prospective* injunctive relief can be ordered against a state official in a lawsuit brought by a citizen of the state and the Eleventh Amendment bars any other relief by the federal court unless it is *ancillary* or *incidental* to the prospective relief already ordered by the court.

In *Quern*, the Court reviewed the principles stated above and concluded that the notice approved by the Court of Appeals was not barred by the Eleventh Amendment because it was "ancillary to the prospective relief already ordered by the court." 440 U.S. 349. Contrary to their argument, *Quern* does not support the granting of the notice relief sought by the Petitioners in the cases now before this Court because, here, there was no prospective injunctive relief ordered by the District Court. Before any final determination on the merits was rendered by the District Court, the Petitioners' claims for prospective injunctive relief became moot through changes in federal law.

The Petitioners cite *Quern* erroneously for the proposition that notice relief and a declaratory judgment regarding the

legality of the State's past conduct constitute prospective injunctive relief. What this Court in fact held in *Quern* was that the modified notice contemplated by the Seventh Circuit was "*ancillary to*" the prospective relief already ordered by the court. Nowhere in *Quern* did this Court state that the notice relief itself was "prospective relief."

Next, the Petitioners argue that the notice relief they seek constitutes prospective injunctive relief because the amount of back benefits owed to a given AFDC recipient or applicant would be calculated in the future and any payment would be made in the future. Therefore, according to the Petitioners, the order would be enforced or implemented in the future. Every court order is enforced or implemented in the future. A purely monetary judgment for compensatory damages is implemented in the future. The injunctive order reversed by this Court in *Edelman* v. *Jordan, supra*, would have been implemented in the future in essentially the same manner as the Petitioners describe in their brief. The Petitioners' argument obliterates any sensible meaning to the prospective-retroactive distinction between permissible and impermissible relief in federal court against state officials under the Eleventh Amendment.

The Petitioners' argument that the relief they seek is analogous to the relief upheld in *Milliken* v. *Bradley*, 433 U.S. 267 (1977) is also without merit. The Petitioners argue that the remedy they seek in this case is no less "prospective" than the injunctive relief ordered against the State in *Milliken*. In *Milliken*, this Court found that the Detroit school system was *currently* unlawfully segregated and that such segregation was caused in part by the actions of the State. To cure the ongoing segregation, this Court approved an injunction which ordered the defendants to implement a remedial program consisting of in-service training for teachers and administrators, guidance and counseling programs, revised testing procedures, and a

remedial reading and communications skills program. 433 U.S. 267, 275-276. This Court held that the District Court had not violated the Eleventh Amendment by requiring the State to share in the cost of these remedial programs because the relief ordered would have a prospective effect only. It was intended to cure an ongoing constitutional violation by desegregating the school system for future (and possibly, current) black students. Obviously, the remedial order would not help those former students who had already left the school system. The remedial components were held to be necessary prospective relief because the Court considered that a pupil assignment plan alone would not automatically cure the ongoing deficiencies caused by a segregated school system. *Id.* at 287.

In this case, the intended purpose of the relief sought by Petitioners is the ultimate payment, out of the State treasury, of an accrued monetary liability; namely, the payment of certain welfare benefits allegedly wrongfully withheld up to (but not after) October 1, 1981. In *Milliken* v. *Bradley, supra,* at 290, n. 22, this Court stated:

> "In contrast to *Edelman*, there was no money award here in favor of respondent Bradley or any members of his class. *This case simply does not involve individual citizens' conducting a raid on the state treasury for an accrued monetary liability.* The order here is wholly prospective in the same manner that the decree mandates vocational schools and assignments, for example.

In summary, there is no reasonable way to interpret the relief sought by the Petitioners in these cases as prospective injunctive relief.

An analysis of the history of the *Quern* litigation supports the Respondent's position that the notice relief the Petitioners

are seeking is barred by the Eleventh Amendment.[1] *Quern* was originally filed in 1971 under the case name *Jordan* v. *Weaver*, No. 71-C-70 (N.D. Ill.). A class of plaintiffs sought declaratory and injunctive relief to require the Illinois welfare department to process applications for the Aid to the Aged, Blind and Disabled (AABD) program within time limits prescribed by federal regulations. In March 1972, the District Court found the defendant's practices to be in violation of the then existing Social Security Act and issued a permanent injunction ordering the defendant to comply in the future with the federal time limits. The court also ordered the state to pay retroactive benefits. The Seventh Circuit Court of Appeals affirmed this judgment. *Jordan* v. *Weaver*, 472 F.2d 985 (7th Cir., 1973).

The Petitioners assert that in *Jordan* v. *Weaver*, 71-C-70 (N.D. Ill., 1972), the District Court issued a declaratory judgment that state officials had violated federal law in the past and that this Court let such judgment stand in its opinion in *Edelman* v. *Jordan*, *supra*. Neither contention is correct. No declaratory judgment was issued by the District Court with respect to any alleged past violations. The only statement in the nature of declaratory judgment was set forth in paragraph 4 of the District Court's judgment (Appendix 2 to brief for the Petitioners) which states:

> "4. Illinois Categorical Assistance Manual, Section 4004, and Subsections thereunder, as applied to applicants for

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[1] A citation history of the *Quern* litigation is as follows: *Jordan* v. *Weaver*, No. 71-C-70 (N.D. Ill., March 1972) aff'd. 472 F.2d 985 (7th Cir. 1973), rev'd. in part, *sub nom. Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Jordan* v. *Trainor*, 405 F. Supp. 302 (N.D. Ill., 1975) (on remand); rev'd., 551 F.2d 152 (7th Cir. 1977); modified, *Jordan* v. *Trainor*, 563 F.2d 873 (7th Cir. 1977) (*en banc*); aff'd. *sub nom. Quern* v. *Jordan*, 440 U.S. 332 (1979).

AABD are invalid insofar as they are inconsistent with the requirements of paragraphs 1 and 2, supra."

Paragraphs 1 and 2 set forth the prospective injunctive relief ordered by the Court. Paragraph 4 clearly refers to the state's then current policy and makes no mention of the state's past actions. The District Court's only treatment of the state's past violations of federal law were covered in paragraph 5 of the judgment which "enjoined" the state officials "to release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968 and April 16, 1972, and were determined eligible. . ." It was this very retroactive injunctive relief that this Court declared violative of the Eleventh Amendment in *Edelman* v. *Jordan*, 415 U.S. 651, 678 (1974).

In *Edelman*, this Court reversed that portion of the decree which awarded retroactive benefits and remanded the case for further proceedings consistent with its opinion. On remand, the District Court ordered state officials to send to each class member a notice informing the client: "You were denied public assistance to which you were entitled in the amount of $____" along with a "Notice of Appeal" form to be signed and returned to the welfare department by the class member. *Jordan* v. *Trainor*, 405 F. Supp. 802 (N.D. Ill. 1975).

The Seventh Circuit Court of Appeals, sitting *en banc*, reversed, holding that the "notice" ordered by the District Court violated the Eleventh Amendment because it served, in effect, as an admission by the state that back benefits were due to the plaintiff class. *Jordan* v. *Trainor*, 563 F.2d 873 (7th Cir., 1977). The Seventh Circuit did, however, find that "a mere explanatory notice to applicants advising them that there was a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits" and the provision of "a simple returnable

notice of appeal form" would not violate the Eleventh Amendment in this particular case. It is clear that the Seventh Circuit approved such a modified notice as an ancillary aspect of the District Court's permanent prospective injunctive relief. To this effect, the Court of Appeals explained:

> "Only the retroactive award provision was struck down by the Supreme Court. The basic controversy did not disappear. *The notice problem we now face is a related aspect of the class controversy controlled by the trial court's permanent injunction.*" (Emphasis added) 563 F.2d 873, 875.

The Court of Appeals emphasized that even as relief ancillary to a permanent prospective injunction, the constitutionality of the "notice" relief is a close question:

> "This court is not in agreement on the constitutionality of such limited relief *as an adjunct to the purely prospective relief granted.* Although we view it as a close question, we hold that in the context of this case a permissible notice may be fashioned within the strictures of the Eleventh Amendment." (Emphasis added). *Id.* at 875.

In conclusion, the Court of Appeals reiterated that its suggested notice and the prospective permanent injunction were "all related and a part of the whole":

> ". . .The district court rightfully curtailed the continuing breach as to the future by permanent injunction. What is now controlled by the permanent injunction and the proposed modified notice are all related and part of the whole which affected the class. . . ." 563 F.2d 873, 878.

This Court in *Quern*, concurred in the reasoning of the Seventh Circuit and affirmed the Court of Appeals' decision.

This Court stressed that the notice relief suggested by the Seventh Circuit did not violate the Eleventh Amendment because it was ancillary to prospective relief already ordered by the trial court. Such a conclusion is consistent with the earlier Supreme Court decisions discussed, *supra*.

The conclusion that the notice relief is dependent upon the existence of properly ordered prospective injunctive relief is supported by this Court's characterization of such relief as "no more than '[the members of the plaintiff class] would have gathered by sitting in the courtroom or by reading and listening to news accounts had the case attracted any attention'." *Quern*, 440 U.S. at 336. What the class members would have gathered by "sitting in the courtroom" was that the District Court had permanently enjoined the state officials from committing future violations of the Social Security Act by failing to process AABD applications in a timely manner and that the lawsuit was now at an end. It is implicit in this Court's statement that *Quern*-type notice relief was never intended to be afforded independent of prospective relief. This Court emphasized this principle in *Quern*, *supra*, at 337 by stating:

> ". . .[A] federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even if such an injunction may have an ancillary effect on the state treasury. . . .*The distinction between the relief permissable under the doctrine of ex parte Young and that found barred in Edelman was the difference between prospective relief on one hand and retrospective relief on the other.*" (Emphasis added).

Again, quoting from *Edelman*, this Court in *Quern*, at 338 held: "A federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective

injunctive relief. . ." Finally, in conclusion, this Court said in *Quern*:

> "The notice approved by the Court of Appeals, unlike that ordered by the District Court, is more properly viewed as ancillary to the prospective relief already ordered by the court. See *Milliken* v *Bradley*, 443 US at 290. The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue . . ." 440 U.S. 332 at 349.

The above quoted language shows that this Court recognized that the disapproved District Court's notice could not properly be viewed as ancillary to prospective relief already ordered by the Court.

A comparison of the Court of Appeals notice which was approved in *Quern* and the District Court notice which was disapproved further illustrates the prospective/retroactive distinction made by the Court between what is and what is not permissible relief against a state official under the Eleventh Amendment. The District Court was ordering the state official to send a notice to each class member stating "You were denied public assistance to which you were entitled in the amount of $____" along with a notice of appeal form to be signed by the recipient stating "the Department illegally delayed in the processing of my AABD application, and, as a consequence, denied me benefits to which I was and am entitled." The District Court notice was the equivalent of a declaratory judgment regarding Illinois' alleged past violations of the Social Security Act. The effect of the District Court notice relief in *Quern* and the relief requested by Petitioners here would be the same.

They both constitute a federal court ruling on the legal merits on a claim regarding a past violation of federal law. Indeed, the relief sought by Petitioners in the instant cases falls even farther afoul of the Eleventh Amendment bar than does the District Court notice relief disapproved in *Quern*. In the *Quern* litigation, in contrast to the cases now before this Court, the District Court could tie its notice relief to the prospective injunctive relief ordered by the Court.

Contrary to the Petitioners' contention in their brief, this Court in *Quern* did not approve an order directing state officials to inform a class of plaintiffs "that their federal rights had been violated in the past." (Petitioners' brief, p. 7). In fact, it was just such an order that the Seventh Circuit Court of Appeals disapproved in *Jordan* v. *Trainor*, 563 F.2d 873 (7th Cir., 1977). This Court then affirmed the Seventh Circuit decision in *Quern*. In contrast, as noted above, the type of order which this Court approved in *Quern* says nothing about the validity of the state's past actions. It merely would inform class members that their federal suit was at an end, that the federal court could provide them no further relief, and that there were state administrative procedures which they may wish to pursue to determine whether they might be eligible for past benefits.

The Petitioners argue that the notice relief in *Quern* was not ancillary to prospective injunctive relief because, by the time the Seventh Circuit proposed the sort of notice relief which would be acceptable under the Eleventh Amendment, the AABD program had been terminated by Congress and, therefore, further enforcement of the prospective injunction was moot. It appears that the Petitioners are trying to argue that *Quern* does not require that notice relief must be ancillary to final prospective relief to be permissible under the Eleventh Amendment. However, merely because with the passage of time due to successive appeals and remand, no further prospective enforcement is necessary, it does not follow that notice

relief loses its character as relief which must be ancillary to final prospective relief. At the time the District Court issued its final judgment on the merits in 1971, the injunctive relief ordered was clearly prospective and involved in ongoing violation of then current federal law. As discussed throughout this brief, it is a critical difference between the relief approved by this Court in *Quern* and the relief sought by Petitioners that here there never was any permanent prospective injunctive relief ordered by the District Court.

B. Declaratory Relief Against State Officials Regarding The Legality Of State Policy Under A Prior Federal Statute Is Prohibited By The Eleventh Amendment.

After October 1, 1981, Petitioners had no claim regarding any ongoing violations of the Social Security Act. Petitioners, however, still claim entitlement to notice informing the proposed class that the Respondent's pre-October 1981 policies violated the Social Security Act and informing them of the existence of administrative remedies that may be available under state law. Such notice relief is dependent upon the existence of a declaratory judgment that the Respondent's pre-October 1, 1981 policies were in violation of federal law. Thus, if the underlying declaratory relief is barred, then necessarily, no notice relief can be considered.

It is uncontested that the Eleventh Amendment precluded the District Court from ordering the Respondent to pay back AFDC benefits to the Petitioners based upon the Respondent's allegedly erroneous interpretation of the pre-October 1, 1981 Social Security Act. See *Edelman* v. *Jordan*, *supra*. Since the federal court has no jurisdiction to remedy the alleged past statutory violation, a declaratory judgment is merely an advisory opinion, which the District Court would not have jurisdiction to issue.

This conclusion is mandated by Art. III, § 2, Cl. 1 of the United States Constitution which this Court has said means that the federal courts have no jurisdiction to determine any legal question brought before them where no actual case or controversy currently exists between the parties. "As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, not abstractions' are requisite." *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89 (1947).

The "case or controversy" requirement in Article III also prevents federal courts from considering questions which no longer represent an "actual controversy" between the parties. "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre* v. *United States*, 319 U.S. 41 (1943). In *North Carolina* v. *Rice*, 404 U.S. 244 (1971), this Court, citing numerous other Supreme Court decisions, reiterated the long established rule that the federal courts do not have jurisdiction over questions which do not affect the rights of the parties before them:

> ". . .Early in its history, this Court held that it had no power to issue advisory opinions. . .and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. . .To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. • • • *It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character,* as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' . . .However, '[m]oot questions require no answer.' . . .Mootness is a jurisdictional question because the Court 'is not em-

> powered to decide moot questions or abstract propositions,' . . .our impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" (Emphasis added.) 440 U.S. 244, 246

The "current case or controversy" requirement applies as well in actions where declaratory judgment is sought since 28 U.S.C. 2201, the statute authorizing declaratory relief, requires "a case of actual controversy." The statutory term has been held to be coterminous with the "case or controversy" requirement found in Art III, § 2 of the Constitution of the United States. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, (1937). Thus, in order for a federal court to entertain Petitioners' declaratory judgment claim against this Respondent, the complaint must set forth a live, actual controversy involving the Department of Social Services and not a moot, abstract or hypothetical dispute.

Since the federal court cannot award monetary relief for alleged past federal law violations and since there were no ongoing violations of federal law which would authorize prospective injunctive relief, there is no current controversy before the federal court. A claim that a state court or administrative tribunal may have jurisdiction to afford a remedy for a past violation is, at best, hypothetical, and does not create a current case or controversy before the federal court for a declaratory judgment on a prior statutory requirement. In any event, as discussed in Part II, *supra*, there is no relief which a state tribunal can afford in this case either.

Even assuming *arguendo* that the retroactive declaratory relief sought by the Petitioners is not barred by Article III, § 2 of the Constitution, it nonetheless is barred by the Eleventh Amendment.

The only purpose for seeking retroactive declaratory relief is ultimately to require the State to pay back welfare benefits to the purported class members. The Petitioners clearly intend that such an order would result in an impact on the State treasury. If the Petitioners are successful, the impact upon the State treasury obviously would be considerable.

The circumstances in the cases before this Court are materially different from the circumstances confronting the Court in *Quern*. The type of notice approved by the Court in *Quern* contained no ruling on the legality of the State's past actions. Consequently, notice relief there afforded the Petitioners no substantive rights beyond what had been declared through the previously issued prospective rulings of the District Court. The fact that the prospective ruling may be applied, via the doctrine of *res judicata* or collateral estoppel, to a subsequent state administrative proceeding regarding back benefits is not a function of the notice relief approved by this Court but is a function of the substantive prospective injunctive relief itself. The notice portion of the relief, however, was purely informational. In this regard, this Court, quoting with approval from the Seventh Circuit decision, said:

> "'The form of notice we envision would not create a "liability" against the state. Whether a liability might result would be a matter for state determination, not the federal court. No federal judgment against the state would be created. . . .'." 440 U.S. 332 at 336.

In contrast, the retroactive declaratory relief requested by the Petitioners here would be an actual determination on the merits of the State's past conduct which is in no way tied to any ruling on the legality of the Respondent's current or future conduct. It is clearly "a federal judgment against the state." In the absence of any applicable affirmative defenses to the invocation of state remedies, the declaratory judgment sought

by the Petitioners would bar or collaterally estop the Respondent from litigating the legal merits of a would-be class member's claim in the State proceedings. See *DePolo* v. *Greig*, 338 Mich 703; 62 N.W. 2d 441 (1954), *Curry* v. *Detroit*, 394 Mich. 327, 331; 231 N.W. 2d 57 (1975). Hence, the link between the relief sought by the Petitioners here and an impermissible impact upon the State treasury is much stronger than in *Quern*, where the "notice" relief added nothing substantive to the *prospective* injunctive relief ordered by the District Court.

C. The Cases Upon Which Petitioners Rely Do Not Support Their Claim For Declaratory Judgment Regarding An Alleged Past Statutory Violation Or Notice Relief.

Not only is the Sixth Circuit's decision, below, in *Banas* v. *Dempsey*, *supra*, supported by the Seventh Circuit's decision in *Jordan* v. *Trainor*, *supra*, it is also supported by the Second Circuit's decision in *Colbeth* v. *O'Rourke*, 707 F.2d 57 (2nd Cir., 1983), *aff'g. Colbeth* v. *Wilson*, 554 F. Supp. 539 (D. Vt., 1982), which involved circumstances indistinguishable from the facts before this Court in the instant case. The plaintiffs there filed a class action suit against Vermont state officials, challenging the state's implementation of federal food stamp requirements. Before final adjudication on the merits, the federal law changed with respect to the challenged policies and mooted out the plaintiffs' claim for prospective injunctive relief. The plaintiffs, nonetheless, claimed that they were entitled to the same type of notice and declaratory relief regarding the pre-amendment policy that the Petitioners are seeking here.

In rejecting any entitlement to notice relief, as did the Sixth Circuit in *Banas*, the District Court in *Colbeth* recognized that in the absence of prospective injunctive relief *Quern* created no independent basis for notice relief. The Court said:

> ". . .the exception to the Eleventh Amendment created by *Quern* is a narrow one. The *Quern* plaintiffs were accorded prospective relief, and the retroactive remedy, comprised of the notice, was incidental to that prospective remedy. *Quern* cannot be construed to establish an independent basis for retroactive relief where prospective relief is not also forthcoming. . . ." 554 F. Supp. 539, 546.

The District Court in *Colbeth* pointed out that, where the "saving element of prospective relief" was absent, *Quern*-type notice would undermine the purpose of the Eleventh Amendment. The court explained that under these circumstances, such relief would facilitate indirectly what federal courts could not do directly under the proscriptions of the Eleventh Amendment. The court also addressed separately whether a declaratory judgment as to the legality of the state's pre-amendment conduct would violate the Eleventh Amendment. The court in *Colbeth* recognized that the effect of such declaratory judgment would be an "end run" around the Eleventh Amendment because, in all probability, the declaratory judgment would be *res judicata* in state court:

> ". . .By obtaining declaratory relief in this court, plaintiff seeks to eliminate the time-consuming and expensive necessity of rearguing the merits of the controversy, because a declaratory judgment would probably be *res judicata* in state court. There is no authority directly addressing the situation before us, but we believe that such a result effects an impermissible 'end run' around the Eleventh Amendment bar and we therefore deny the request for declaratory relief." 554 F. Supp. 539, 547.

The District Court pointed out that even if such a declaratory judgment would not be *res judicata*, it would serve no useful purpose and, therefore, would be inappropriate for that reason as well. 554 F. Supp. 539, 547, n. 2. In affirming the District

Court, the Second Circuit in *Colbeth* v. *O'Rourke*, *supra*, adopted the reasoning of the District Court in its entirety.

In *Dandridge* v. *Coler*, No. 84C930 (N.D. Ill., 1985), another District Court also held that, where prospective injunctive relief has become moot through a change in law, neither notice nor declaratory relief can be ordered with respect to any pre-amendment legal challenge that does not continue after the change in law. See Slip Opinion in the Appendix accompanying this Brief. The court distinguished the case of *Simpson* v. *Miller*, 93 F.R.D. 540 (N.D. Ill., 1982), which was decided by the same court and which is relied upon by the Petitioners in this case, since in *Simpson* the challenged state policy was found to be in violation of both the old *and* the new law. Slip. Op. at 5.

All of the other lower court cases cited by the Petitioners are distinguishable from the instant case as well. In *Silva* v. *Vowell*, 621 F.2d 640 (5th Cir., 1980), the Plaintiffs filed a class action law suit claiming that Texas' AFDC eligibility policy regarding incapacitated parents violated the Social Security Act. After the law suit was filed, the Defendants revised their policy "as a result of [the] class action" and not as a result of any law change. *Id.* at 644. The court held that the Eleventh Amendment did not bar notice relief with respect to the past illegal action which the state officials had voluntarily ceased after the law suit was filed. As this Court has recognized, voluntary cessation of illegal conduct does not usually render the alleged violation moot. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). In addition, the *only* challenge raised by the Defendants in *Silva* to the issuance of notice relief was the cost of sending the notice. This is not the basis on which the Respondents rely in challenging the constitutionality of *Quern*-type notice here.

Appleyard v. *Wallace*, 754 F.2d 955 (11th Cir., 1985) also was a case in which the State defendants voluntarily changed a challenged welfare policy after a law suit was filed claiming such policy violated federal law. Plaintiffs sought *Quern*-type notice with respect to the old policy, and the only defense to such notice raised by the State officials was that *Quern*-type notice was not available because class certification had been denied. In holding that class certification was wrongly denied, the Court of Appeals disposed of the only defense raised by the State.

In passing, however, the court in *Appleyard* noted another "interesting issue" which was first raised only at oral argument; namely, "[w]hat is the meaning of the Supreme Court's statement in *Quern* that the notice relief 'is more properly viewed as ancillary to the prospective relief already ordered by the court'." *Id.* at 961. The Court went on to decide the question without the benefit of briefs by either party. *Id.* n. 6. The Court recognized that *Quern* v. *Jordan* "could. . .be interpreted as requiring that some actual injunctive, declarative, or other prospective relief, aside from the notice itself, together with the concomitant determination that the defendants acted illegally, precede an award of notice relief." *Id.* at 961-962. The Court concluded, however, based upon its incorrect interpretation of *Milliken* v. *Bradley, supra*, and "subsequent case law," that the Supreme Court "did not intend such a result." *Id.* at 962. The only "subsequent case law" relied upon was the Fifth Circuit decision in *Silva* v. *Vowell, supra*, which the court stated was binding precedent unless and until overruled by the Eleventh Circuit sitting *en banc*. *Id.* at 962, n. 7.

Beltran v. *Myers*, 701 F.2d 91 (9th Cir., 1981); *cert. den., sub nom. Rank* v. *Beltran*, —— U.S. ——; 103 S. Ct. 3115 (1983), is also not persuasive precedent. In *Beltran* v. *Myers*, 451 U.S. 625 (1981), the Supreme Court considered a decision

of the Ninth Circuit upholding the validity under federal law of California's interpretation of a Medicaid requirement. Because of an imminent change in federal law, a majority of this Court vacated the judgment and remanded the case for consideration of the "validity of the California law under the *new* federal law." 451 U.S. 625 at 628 (emphasis added). The majority also expressed doubt as to whether, given the change in law, it was appropriate to decide the merits of the legality of the old statute. ("This raises the question whether it is appropriate for the Court to decide the merits of the underlying dispute as considered by the Court of Appeals.") *Id.* at 628.

On remand, the District Court ignored the directive of the majority of this Court and held only that California's Medicaid policies violated former federal Medicaid requirements and ordered *Quern*-type notice relief against the State. On appeal, the Court of Appeals, without explanation, determined that a *Quern*-type notice was appropriate. The only defense raised by California was the cost and administrative burden of sending such notice. Since the Respondent's argument here is not based upon the cost or administrative burden of sending the *Quern*-type notice to prospective class members, the decision in *Beltran* has little bearing on the cases before this Court. *Beltran* is also unpersuasive given the lack of analysis of *Quern* and other pertinent Eleventh Amendment decisions of this Court.

In *Randall* v. *Lukhard*, 709 F.2d 257 (4th Cir., 1984), a Court of Appeals panel held that a Virginia Medicaid policy violated federal law both before *and* after a Congressional amendment to the Social Security Act, effective July 1, 1981. The panel then went on to approve, with modification, the District Court order including *Quern*-type notice relief *"as part of an order that also included prospective injunctive relief."* 709 F.2d 257, 269 (Emphasis added).

On rehearing *en banc*, *Randall* v. *Lukhard*, 729 F.2d 966 (4th Cir., 1984), the Court of Appeals reversed the three-judge panel's determination that Virginia's policy violated the post-July 1, 1981 Social Security Act. The *en banc* decision was limited to a discussion of the merits of the claimed prospective violation of federal law. As to the other aspects of the panel's decision, the Court of Appeals *en banc* decision adopted the reasoning expressed by the panel majority. *Id. at* 967. Thus, the *en banc* decision contains not a word regarding *Quern* or any Eleventh Amendment issues affecting the propriety of notice relief. It appears that the *en banc* decision, therefore, overlooked the effect that its reversal of the finding of a prospective federal violation had on ancillary notice relief. This is particularly apparent since the *en banc* decision specifically ratified the three-judge panel's reasoning regarding notice relief, which did recognize the requirement that such notice relief must be ancillary to prospective injunctive relief.

To the extent that any of the foregoing cases relied upon by the Petitioners can be interpreted more broadly than discussed above, the Respondent urges that this Court reject such conclusions as inconsistent with the requirements of the Eleventh Amendment, as reflected by this Court in its previous decisions, and in the lower court decisions in *Banas, supra, Colbeth, supra, Jordan* v. *Trainor, supra,* and *Dandridge, supra.*

II.

NO HEARING REMEDIES WERE AVAILABLE TO THE PETITIONERS OR ANY MEMBERS OF THEIR PURPORTED CLASS AFTER DECEMBER 31, 1981.

As discussed *supra,* the Petitioners do not challenge the legality of any of the Respondent's AFDC eligibility determinations after October 1, 1981, the effective date of the OBRA Amendments to the Social Security Act. Federal regu-

lations controlling the State's administration of the AFDC program *mandate* that no request for an administrative hearing protesting a departmental action can be granted more than 90 days after the challenged action has occurred. As of December 31, 1981, 90 days after the effective date of the OBRA amendments, the foregoing regulations precluded all Petitioners and all members of Petitioners' proposed, but uncertified, class from beginning to pursue any state administrative remedy, as a matter of federal law. The Petitioners' Motions for Summary Judgment were not decided until June 22, 1982, more than 90 days after any allegedly illegal action would have been taken against any of the Petitioners. Thus, the notice relief sought by the Petitioners, informing would-be class members "that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits," would be in conflict with the federal regulations quoted above.

This Court in *Quern* did not address the question of conflict between federal AFDC requirements and notice relief. The Court did address (440 U.S. at 348, n. 20) respondent's concern that, if the State awarded retroactive relief, the federal government might not provide reimbursement for its share of the payments. However, the issue was not addressed by the Court as one involving a conflict between the relief proposed and mandatory federal requirements.

The Petitioners state in passing that they may have other independent remedies in state court (Petitioners' brief, p. 45, n. 10). However, the Petitioners in the litigation below limited their request for notice relief to notice of available *administrative* procedures. (See J.A. 14, *Banas*, R. 28, *MWRO*, R. 33A) Thus, the issue of whether or not any state court remedies can still be pursued is not before this Court for review.

Assuming *arguendo* that the propriety of a notice regarding availability of state judicial (as opposed to administrative) remedies is properly before this Court for review, such proposed relief is also not available as a matter of state law.

Petitioners suggest that M.C.L.A. 400.37; M.S.A. 16.437, provides an alternative judicial remedy in state court. That statute is merely a state enactment of the federal regulations regarding administrative hearing requirements and the right to judicial review of the hearing decision thereafter. In this regard, in addition to 45 C.F.R. 205.10(a)(5)(iii), 45 C.F.R. 205.10(a)(17) provides:

> "(17) The claimant shall be notified of the decision in writing and, to the extent it is available to him, of his right to appeal to State agency hearing or judicial review."

Since administrative hearings must be requested within 90 days of the Department's challenged action concerning the assistance grant level, and since, pursuant to 45 C.F.R. 205.10(a)(16), the administrative action must be completed within 90 days of the hearing request, and since, pursuant to M.C.L. 400.37; M.S.A. 16.437, any adverse hearing decision must be appealed to State Circuit Court within 30 days thereafter, an appeal to Circuit Court would also no longer have been available to any Petitioner at the time the District Court decided the Petitioners' Motions for Summary Judgment on June 22, 1982, almost 9 months after the Petitioners' claims for prospective injunctive relief became moot.

In addition, notice to class members of a right to appeal an adverse administrative decision to State Circuit Court would be unnecessary because such notice is already given pursuant to 45 C.F.R. 205.10(a)(17), quoted above. See also J.A. 92.

In any event, the relief Petitioners seek would now be barred by the three year statute of limitations for actions against the State in the Court of Claims, pursuant to M.C.L. 600.6452; M.S.A. 27A.6452. For purposes of an action under 42 U.S.C. § 1983, the applicable period of limitations is three years as specified in the general statute of limitations for injuries to persons or property. M.C.L. 600.5805(8); M.S.A. 27A.5805(8). *Wilson* v. *Garcia*, 471 U.S. ——, 85 L.Ed.2d 254 (1985).

Petitioners cannot argue that any statute of limitations on any state remedies has been tolled while they are litigating their § 1983 actions in federal court. The case of *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980) is controlling on this question. In that case, this Court explained that

> "Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal courts under § 1983 — a void which is commonplace in federal statutory law. When such a void occurs, this Court has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action."[2] 446 U.S. 478, 483

The Court explained that "this 'borrowing' logically included rules of tolling." The Court then went on to analyze whether, under New York law, the filing of one cause of action tolled the statute of limitation for another related, but independent cause of action. The Supreme Court found no such tolling provision in New York law. To this effect, the Court said:

> "No section of law provides, however, that the time for filing a cause of action is tolled during the period in

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[2]

In *Wilson* v. *Garcia*, *supra*, the Court said that the appropriate statute to be "borrowed" was the state's statute of limitations on an action for injuries to persons.

> which a litigant pursues the related, but independent cause of action. If a plaintiff wishes to pursue his claims in succession, rather than concurrently, the legislature has required plaintiff to either obtain a judicial stay of the time for commencing an action, or to litigate at risk." 446 U.S. 478, 486-487.

The Court then found that the respondent's § 1983 action was "separate and independent" from state administrative and judicial review remedies. To this effect, the Court said:

> "As in those cases, there is no question that respondent's 1983 action was 'separate and independent' from the state judicial remedy pursued in state court. This Court has not interpreted § 1983 to require a litigant to pursue state judicial remedies prior to commencing an action under this section. In *Monroe* v. *Pape*, 365 U.S., at 183, we held: 'It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' Thus the very independence of § 1983, reveals that the New York rule precluding tolling in the circumstances of this case is not 'inconsistent' with the provisions of § 1983." 446 U.S. 478, 491 (footnote omitted).

As in the *Tomanio* case, Michigan also has no tolling statute which would apply in this case. See *Buscaino* v. *Rhodes*, 385 Mich. 474; 189 N.W.2d 202 (1971) and *Stewart* v. *Michigan Bell Tel. Co.*, 39 Mich. App. 360; 197 N.W.2d 465 (1972), which discussed the limited scope of Michigan's tolling statutes. Thus, for the reasons stated in *Board of Regents* v. *Tomanio, supra*, the limitation period for Plaintiffs' state administrative remedies were not tolled by the filing of this § 1983 action.

The Fourth Circuit Court of Appeals panel in *Randall* v. *Lukhard*, *supra*, also recognized that the propriety of *Quern*-type notice was dependent upon the existence of available state-established remedies. *Id.* at 270. It found that, although Virginia required that hearing requests be made within 30 days of the welfare department's action, Virginia had adopted a rule whereby the 30-day limit could be excused for good cause shown. The Michigan Department of Social Services has no such exception to its 90-day limitation on hearing requests. In any case, any extension beyond 90 days would be prohibited by 45 C.F.R. 205.10(a)(5)(iii) which is a federal mandatory time limitation on hearing requests. The court also found that Virginia's three-year statute of limitations on pecuniary claims against the State in state court had not yet run. *Id.* at 270. As established *supra*, the statute of limitations for such action in Michigan has run. In addition, in contrast to the cases at bar, no question of the State's immunity in state court was raised.

On p. 25 of their brief, Petitioners erroneously argue that, pursuant to 42 U.S.C. 602(a)(22), regardless of any federal limitation on administrative hearing remedies, a State *must* pay retroactive welfare benefits to recipients if a federal court makes a declaratory ruling that the State's past practices violated past federal AFDC requirements. 42 U.S.C. 602(a)(22) provides in pertinent part:

> "(a) A state plan for aid and services to needy families with children must
>
> • • •
>
> (22) provide that the state agency will promptly take all necessary steps to correct any overpayment or underpayment of aid under the State's plan. . ."

Federal regulations define an underpayment as follows:

". . .Underpayment means a financial assistance payment received by or for an assistance unit for the payment month which is less than the amount for which the assistance unit was eligible, or failure by the State to issue a financial assistance payment for the payment month to an eligible assistance unit if such payment should have been issued. . . ." 45 CFR 233.20(a)(13)(ii)

As defined above, an underpayment is an AFDC payment which is less than the amount for which the recipient was eligible or a failure to make an AFDC payment for which the recipient was eligible. However, the State has never agreed that any of the Petitioners were eligible, prior to October 1, 1981, for any greater AFDC benefits than they received. Unless and until a recipient's eligibility for any back benefits has been established, no underpayment exists, as that term is defined in the federal regulations. Under federal regulations, where eligibility is disputed, as it is in these cases, the recipient must make a timely request for a hearing to have the disputed eligibility determined.

Contrary to the implication in Petitioners' brief, 42 U.S.C. 602(a)(22) does not require the Respondent to grant hearings to recipients regardless of whether or not they had requested administrative hearings within the 90-day limit set forth in 45 C.F.R. 205.10(a)(5)(iii). 42 U.S.C. 602(a)(22) is merely a provision which states that if an underpayment of assistance is established, the State must promptly correct such underpayment. The provision, however, does not specify or control the conditions under which the State must conduct a hearing to determine if an underpayment has occurred.

Petitioners' interpretation of 42 U.S.C. 602(a)(22) renders the 90-day hearing request limitation in 45 C.F.R. 205.10(a)(5)(iii) utterly meaningless. Every recipient who wishes to challenge a Departmental action concerning his assistance

grant is, in effect, claiming that there has been an underpayment of assistance. Under the Petitioners' argument, so long as any claimant asserts that he was entitled to more benefits than he received, he could demand a hearing at any time. Obviously, such results were not contemplated under 45 C.F.R. 205.10(a)(5)(iii) or 45 C.F.R. 233.20(a)(13), the regulation implementing 42 U.S.C. 602(a)(22). The only reasonable interpretation of 42 U.S.C. 602(a)(22) and the regulations thereunder is that after the Department of Social Services has determined that there has been an underpayment, it cannot delay in correcting such underpayment.

The foregoing conclusion is supported by 45 C.F.R. 205.10 (a)(18) which provides:

> "*When* the hearing decision is favorable to the claimant, or *when* the agency decides in favor of the claimant prior to the hearing, the agency shall promptly make corrective payments retroactively to the date the incorrect action was taken." (Emphasis aded.)

Thus, if there has been no hearing determination and if the Department does not, *sua sponte*, determine that it has made an underpayment, 42 U.S.C. 602(a)(22) is inapplicable. As discussed above, in the cases at bar, no administrative hearing remedy is available and the Department continues to believe that its policies did not violate the Social Security Act prior to October 1, 1981.

Assuming *arguendo* that the Plaintiffs' interpretation of 42 U.S.C. 602(a)(22) is correct, then the relief requested by the Plaintiffs would be an even more blatant violation of the Eleventh Amendment. Under Plaintiff's interpretation of 42 U.S.C. 602(a)(22), a declaratory judgment stating that the Respondent's past actions denied Petitioners public assistance benefits in violation of the Social Security Act would result,

with certainty, in a monetary liability against the State treasury, since the State would be stripped of all legal and procedural defenses against the Petitioners' claims.

The Petitioners state that 45 C.F.R. 205.10(a)(3) requires "state officials to provide notice of the recipient's right to a hearing 'at the time of any action affecting his claim'." (Petitioners' Brief at 23) The Petitioners imply that "any action" would include action by a federal court granting declaratory judgment regarding an alleged past violation of the Social Security Act. The Petitioners also imply that "claim" refers to a "claim" made by recipients in such federal law suit. Thus, the Petitioners imply that 45 C.F.R. 205.10(a)(3) affords them a right to an administrative hearing at any time a federal court renders a final decision in their favor. However, it is clear, upon considering 45 C.F.R. 205.10(a)(3) in context with other pertinent sections of the regulations, including 45 C.F.R. 205.10(a)(4) and 205.10(a)(5), that "actions" refers to actions of the state department affecting eligibility, and that "claim" refers to the recipient's claim to the State agency for financial assistance. Thus, 45 C.F.R. 205.10(a)(3) merely requires that when the *Department* takes any *action* affecting the client's claim for financial assistance, it must inform the client of his right to request a hearing, if the action resulted in a denial, suspension, reduction, discontinuation, or termination of public assistance to which he thinks he is entitled (so long as such hearing request is made within 90 days of the Department's action).

In summary, 45 C.F.R. 205.10(a)(3) has nothing to do with any recipient's right to notification regarding action taken by a federal court.

In conclusion, regardless of the merits of Petitioners' Eleventh Amendment Argument, no state remedies are avail-

able to them, as a matter of law and, therefore, the relief they seek is inappropriate on this basis, alone.

CONCLUSION

For the reasons stated above, the decision of the Sixth Circuit Court of Appeals should be affirmed.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA DANDRIDGE, etc., Plaintiff, v. GREGORY COLER, Director, et al., Defendants.	NO. 84 C 930

MEMORANDUM OPINION

This case involves a suit by representatives of a class of MANG(AFDC) applicants and recipients, challenging the eligibility standards used by the State of Illinois in its Medicaid program for the medically needy. Plaintiffs seek a declaratory judgment that the use of different income eligibility standards for MANG(AFDC) and MANG(AABD) benefits violates federal law, and had requested a permanent injunction against further use of those standards.

On October 11, 1984, this court issued an opinion denying plaintiffs' motion for summary judgment, granting defendants' motion for same, and dismissing the case. In that opinion, we held that because the State of Illinois had elected the § 209(b) option under the Supplemental Security Income Act for the Aged, Blind and Disabled, 42 U.S.C. § 1396(a)(f), eligibility standards for MANG(AFDC) and MANG(AABD) recipients in Illinois are not required to conform to the "identical standard" and "comparability" requirements of other portions of the Act. *Dandridge v. Coler*, No. 84 C 930, slip op. at 7-8 (N.D. Ill. Oct. 11, 1984) (Grady, J.). Plaintiffs had also argued that the Illinois standards did not comply with the dictates of § 209(b) itself. Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment, at 1-2.

We did not decide this second issue because we felt the plaintiff class of MANG(AFDC) applicants and recipients did not have standing to challenge standards related only to the MANG(AABD) program. *Dandridge v. Coler,* slip op. at 8 n. 9. Following our opinion, plaintiffs filed a motion to alter or amend that judgment pursuant to Fed. R. Civ. P. 59(e) on the basis that our standing analysis mischaracterized the nature of the relief plaintiffs seek.

We are inclined to agree with plaintiffs that our prior decision dismissing their second argument for lack of standing was in error. Plaintiffs' motion to alter or amend must be denied, however, as this court is precluded by the Eleventh Amendment from further consideration of this case.

On January 1, 1985, a new state law directed at the same inequities challenged in this lawsuit took effect. Public Act 83-1450 amends the Illinois Public Aid Code and mandates the use of a uniform eligibility standard for MANG benefits using the maximum income standard allowed under Title XIX of the federal Social Security Act. P.A. 83-1450 (House Bill No. 1522), 83rd General Assembly, 7 1984 Ill. Legis. Serv. 47 (West); *see also* Ill. Rev. Stat. ch. 23, § 5-2. This statutory change prohibits the Illinois Department of Public Aid from applying different eligibility standards for MANG(AFDC) and MANG(AABD) recipients. Defendants have submitted the policy changes enacted by the Department of Public Aid in conformance with the new law, and plaintiffs agree that their claim for an injunction preventing the application of different standards is now moot. Defendants' Amended Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend, Exhibit B; Plaintiffs' Reply Memorandum, at 1.

If this suit involved private defendants, plaintiffs would still have a live, justiciable claim for money damages, and the case as a whole would not be mooted by the statutory change.

See Simpson v. Miller, 93 F.R.D. 540, 543, n. 4 (N.D. Ill. 1982). It is well settled, however, that the Eleventh Amendment[1] precludes suits for money damages which must be paid from public funds in a state treasury unless a state has consented to such suits. *See Kennecott Copper Corp v. State Tax Commission*, 327 *U.S.* 573 (1946). Where a state has not consented, state officials may still be sued to enjoin state actions which violate federal law, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908),[2] although such actions are limited to claims for prospective injunction relief. Retroactive relief to remedy past violations is barred by the Eleventh Amendment, as such relief "resembles far more closely the monetary award against the State itself ... than it does the prospective injunctive relief awarded in *Ex parte Young*." *Edelman v. Jordan*, 415 U.S. 651, 665 (1974) (citation omitted).

Plaintiffs recognize that retroactive relief is not available, however, they argue that they are still entitled to "notice relief" under *Quern v. Jordan*, 440 U.S. 332 (1979), and that this claim for notice relief saves the suit from being found completely moot. The Supreme Court in *Quern* held that although

---

[1]

The Eleventh Amendment reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. *See* Hans v. Louisiana, 134 U.S. 1 (1890), for the Court's ruling that the Eleventh Amendment also bars suits brought against an unconsenting State by its own citizens.

[2]

In *Ex parte Young*, a federal court prohibited the Attorney General of Minnesota from bringing suit to enforce a state statute that violated the Fourteenth Amendment. The Court held that the Eleventh Amendment did not prohibit this injunction because the unconstitutional state statute was "void" and therefore did not "impart to the state official any immunity from responsibility to the supreme authority of the United States." *Young*, 209 U.S. at 160.

a federal court could not order state officials to award back benefits to individuals previously denied public assistance under a policy enjoined by the court, the state defendants could be ordered to send out an explanatory notice informing members of the plaintiff class that the federal suit had concluded and there were state administrative procedures in existence which they might wish to pursue. *Id.* at 349. Although the notice might ultimately result in the issuance of back benefits to those individuals who took advantage of the state administrative procedures, the Court held that this was not the type of retroactive relief barred by the Eleventh Amendment, because the chain of causation from the notice to the award of benefits contained "numerous missing links, which can be supplied, if at all, only by the State and members of the plaintiff class, not by a federal court." *Id.* at 347. The Court reasoned that:

> Whether a recipient of notice decides to take advantage of those available state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court.

Id., at 328. The notice approved in *Quern* was viewed by the Court as "ancillary to the prospective relief already ordered by the court." *Id.*, at 349.

Plaintiffs in this case seek a declaratory judgment as to the legality of the state's former MANG eligibility determination policy and *Quern* notice relief ancillary to that judgment. They argue that these claims are to remedy the denial of benefits to the plaintiff class prior to January 1, 1985, and that so long as plaintiffs are not notified of a "state damage remedy," they are suffering a continuing injury unaffected by the recent change

in Illinois law. A claim for declaratory judgment alone is insufficient to keep an otherwise moot case live, *Ashcroft* v. *Mattis*, 431 U.S. 171 (1977); however, plaintiffs argue that their request for *Quern* notice relief is a "present right" which is still at stake. Plaintiffs' Reply Memorandum, at 5; *Ashcroft*, 431 U.S. at 172 (where no "present right" is at stake, there is no live "case or controversy").

In support of their argument, plaintiffs point to the court's decision in *Simpson* v. *Miller*, *supra*. In *Simpson*, the federal law governing the deduction of work-related child care expenses in calculating the amount of AFDC benefits to be awarded was changed during the course of a lawsuit challenging the State of Illinois' policy regarding such deductions. The court held that the claims of the plaintiff class members who were denied the full amount of their benefits prior to the federal law change were not moot, since "[p]laintiffs continue to be denied the full amount of benefits they claim they were entitled to, and the putative class still has not been notified that it has a state damage remedy. As long as the defendants do not notify the putative class of their asserted remedy, plaintiff's claim of a 'present right' to notice relief . . . remains live." *Simpson* v. *Miller*, *supra*, 93 F.R.D., at 343 (citation omitted). We note, however, that although the federal law in *Simpson* was amended, the challenged state policy itself was never changed, and that policy was ultimately found by the court to be in violation of both the old and the new federal law. *Simpson* v. *Miller*, 535 F.Supp. 1041 (N.D. Ill. 1982). The *Quern* notice relief requested in *Simpson* was there ancillary to the prospective relief issued when the court enjoined the state's policy as violative of both versions of the federal law. *Id.*

A Michigan policy similar to the one at issue in *Simpson* v. *Miller* was challenged in *Banas* v. *Dempsey*, 742 F.2d 277 (6th Cir. 1984). The *Banas* suit was also initiated prior to the changes in federal law governing the deduction of work-

related child care expenses. The Michigan state defendants, however, implemented new policies consistent with the new federal law on the date the federal law took effect. *Id.*, at 279. The Sixth Circuit Court of Appeals held that since the plaintiffs' primary claim for relief, an injunction against the former policy as violative of federal law, was mooted by both the change in federal law and change in state policy, the federal court was barred by the Eleventh Amendment from awarding *Quern* notice relief. "To escape the bar of the Eleventh Amendment, an order against state officials must be both 'prospective' *and* ancillary to a *Young* injunction ordering state officials to comply with federal law—the 'prospective-compliance exception.'" *Id.*, at 288. *Quern* notice relief, therefore, is not a right in and of itself separate from prospective relief, and since the claim in *Banas* for a prospective injunction was moot, the claim for *Quern* notice was barred by the Eleventh Amendment. *See also Colbeth v. Wilson*, 554 F. Supp. 539 (D.Vt. 1982), *aff'd sub. nom., Colbeth v. O'Rourke*, 707 F.2d 57 (2d Cir. 1983).

Because defendants in this case have changed their policy and therefore mooted all claims for prospective relief, we believe this case is more analogous to *Banas* than *Simpson*. Plaintiffs agree that defendants' current policy does not violate federal law, and we believe that in order to avoid the bar of the Eleventh Amendment, *Quern* notice relief must be ancillary to something more than a declaratory judgment governing past official conduct. For us to now decide that the former state policy was unlawful and award relief on that basis "would facilitate indirectly what this court cannot do directly under the proscriptions of the Eleventh Amendment." *Colbeth v. Wilson, supra*, 554 F. Supp. at 547. We therefore hold that plaintiffs' prospective injunctive relief claim is now moot, and that we are barred by the Eleventh Amendment from deciding any remaining retroactive claims plaintiffs may have. *See Pennhurst State School & Hospital v. Halderman*, —— U.S. ——,

104 S.Ct. 900 918 (1984) ('The Eleventh Amendment is an explicit limitation on the judicial power of the United States.' *Missouri v. Fiske*, 290 U.S., a 25. It deprives a federal court of power to decide certain claims against States that otherwise would be within the scope of Art. III's grant of jurisdiction.").[3]

In light of our finding that this case is now moot, plaintiffs request that we vacate our opinion and judgment order of October 11, 1984, in accordance with the doctrine of *United States v. Munsingwear*, 340 U.S. 36 (1950). Under *Munsingwear*, a judgment in a case which has become moot pending appeal must be vacated and the case dismissed. "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure

---

[3]

Plaintiffs also argue that this case is not moot despite the enactment of Public Act 83-1450, because the change in defendants' policy was a voluntary cessation of allegedly illegal acts. Mere voluntary discontinuance of challenged conduct is not sufficient to moot a case where defendants will then be free to return to their old ways. *See* City of Mesquite v. Aladdin's Castle, *Inc.*, 455 U.S. 283 (1982); Quern v. Mandley, 436 U.S. 725 (1978); *see also* Charles v. Daley, No. 83-3175, slip op. at 9-10 (7th Cir. November 30, 1984) (court of appeals holds that suit to enjoin the enforcement of portions of the Illinois Abortion Law is not moot even though that law has since been revised). We do not think that defendants' conduct here warrants a finding that defendants will return to the old MANG eligibility standards when this case is dismissed. Unlike the city ordinance challenged in *City of Mesquite*, the new state law was not enacted solely to avoid the consequences of this lawsuit; this is especially true since our prior opinion in this case upheld the validity of defendants' policy. *See* Commodity Futures Trading Commission v. Board of Trade, 701 F.2d 653, 655-56 (7th Cir. 1983). While it is certainly possible that P.A. 83-1450 may be repealed, leaving the state free to reinstate its former eligibility standards, plaintiffs have given us no indication that such an event is likely to occur.

is followed, the rights of all parties are preserved; none in prejudiced by a decision which in the statutory scheme was only preliminary." *Id.*, at 40. *See also Gjertsen v. Board of Election Commissioners of the City of Chicago,* No. 84-1373, slip op. at 5 (7th Cir. Dec. 14, 1984); *Commodity Futures Trading Commission, supra,* 701 F.2d at 656-57. We find no reason here to make an exception to that rule. We therefore vacate our opinion and order of October 11, 1984, and dismiss this case without prejudice.

DATED: JAN 25, 1985

ENTER: John D. Grady /s/
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA DANDRIDGE, etc., Plaintiff, v. GREGORY COLER, Director, et al., Defendants.	NO. 84 C 930

JUDGMENT ORDER

This cause came on to be heard on the motion of plaintiffs Luella Dandridge and all others similarly situated to alter or amend this court's judgment of October 11, 1984, or in the alternative, to vacate that judgment and dismiss this case without prejudice. The court having found that injunctive relief is now moot and plaintiffs' further claims are barred by the Eleventh Amendment,

IT IS HEREBY ORDERED that this court's Memorandum Opinion and Judgment Order of October 11, 1984, be vacated and this case is dismissed without prejudice.

DATED: JAN 25 1985

ENTER: John D. Grady /s/
United States District Judge

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article III, § 2, Cl. 1:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, — to all Cases Affecting Ambassadors, other public Ministers and Consuls; — to all Controversies to which the United States shall be a Party; — to Controversies between two or more States; — different States, — between citizens of the same State claiming Lands under Grants of different States, — and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

28 U.S.C. 2201:

> "*In a case of actual controversy* within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." (Emphasis supplied)

M.C.L.A. 400.37; M.S.A. 16.437:

> "Whenever an application is made for assistance, the county department of social welfare shall make a thorough investigation and report to the state department in the manner prescribed by it, giving its recommendation of the amount of assistance, if any, to be allowed. If the application be disallowed, or if the applicant is dissatisfied with the amount of assistance he is receiving, or is to receive, he may demand, in writing, a hearing of his case, as provided for in section 9 or section 65. The applicant or recipient may appeal to the circuit court of the county in which he resides, which court shall have power to review questions of law involved in any final decision or determination of the state department. Said petition shall be filed within 30 days of the receipt of such decision or determination. The petitioner shall not be required to furnish any bond and costs shall not be taxed against him. If the court shall decide in favor of the petitioner, assistance shall be paid from the first day of the month following the date of the application therefor or of the date of the original application for the relief in question."

45 C.F.R. 205.10(a) (3), (4), (5), in pertinent part:

> "(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act shall provide for a system of hearings under which:
>
> • • •
>
> (3) Every applicant or recipient shall be informed in writing at the time of application and at the time of any action affecting his claim:

(i) Of his right to a hearing, as provided in paragraph (a) (5) of this section;

• • •

(4) In case of intended action to discontinue, terminate, suspend or reduce assistance. . . :

(i) The State or local agency shall give timely and adequate notice, except as provided for in paragraphs (a) (4) (ii), (iii), or (iv) of this section. Under this requirement:

(A) 'Timely' means that the notice is mailed at least 10 days before the date of action, that is, the date upon which the action would become effective;

(B) 'Adequate' means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency hearing, and the circumstances under which assistance is continued if a hearing is requested;

• • •

(5) An opportunity for a hearing shall be granted to any applicant who requests a hearing because his or her claim for financial assistance. . .is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance,. . .

• • •

(iii) *The claimant shall be provided reasonable time, not to exceed 90 days, in which to appeal an agency action;*

* * *"

(Emphasis added.)

Supreme Court, U.S.
FILED
SEP 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-6270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHNNY GREEN, GAIL BLESSING, THERESA E. COVEYOU, GILDA MILLS, and JUDGE MILLS on behalf of themselves, their children, and all others similarly situated,
Petitioners,

v.

AGNES MARY MANSOUR, Director, Michigan Department of Social Services,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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ARGUMENT

I. Notice Relief Need Not Be Justified As Prospective Relief Or As "Ancillary" To Prospective Relief Because The Eleventh Amendment Bars Only Retroactive *Monetary* Relief Against A State Officer *Payable By The State Treasury.*

The Sixth Circuit decision below and respondent's brief are based upon the proposition that notice relief must be "ancillary" to a permanent injunction to be permissible under the Eleventh Amendment, because an injunction ordering notice relief otherwise constitutes prohibited "retroactive" relief. The key to this argument is the contention that *any* relief against a state officer based upon a "federal court ruling on the legal merits of a claim regarding a past violation of federal law" is "retroactive" relief. Respondent's Brief (R.B.) at 11. Respondent's argument is neither supported by the cases she cites nor consistent with other forms of relief that have been routinely approved by this Court, including the order for notice relief approved in *Quern* v. *Jordan*, 440 U.S. 332 (1979).

A. The Prospective-Retroactive Test Does Not Apply To Relief Which Has No Cognizable Fiscal Impact On The State Treasury.

All the cases that use the prospective-retroactive test have involved relief (against state officers) which had a monetary impact on the state treasury. This makes sense because the very purpose of the test is to solve the apparent conundrum that, though it is fiscal impact that pierces the fiction of *Ex Parte Young*, (see *Ford Motor Co.*, v. *Treasury*, 323 U.S. 459, 464 (1945) and *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974)), some relief with costly financial impact will be barred while other relief with equal if not greater fiscal impact will not. *Cf. Edelman*, 415 U.S. at 682 (Douglas J., dissenting).

In *Edelman*, the two forms of relief being distinguished were the district court's permanent injunction and its award of retroactive benefits, both of which had obvious financial impact. In discussing the relevance of earlier cases ordering costly though permissible prospective relief, this Court in *Edelman* clearly focussed upon the financial impact of the relief in question. See *id.* at 667-668, discussing *Ex Parte Young*, 209 U.S. 123 (1908), *Graham* v. *Richardson*, 403 U.S. 365 (1971), and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). The relief in these cases, though costly, was permitted because "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature." *Id.* at 667-668. The Court then distinguished the *Jordan* district court's prohibited award of retroactive benefits as "indistinguishable. . . from an award of damages against the state" because it was "a form of compensation" which was "measured in terms of a monetary loss resulting from a past breach of a legal duty. . ." *Id.* at 668.

All cases applying the prospective-retroactive test after *Edelman* have similarly involved relief with undeniable financial impact. See *e.g.*, *Milliken* v. *Bradley*, 433 U.S. 267, 277 (1977), *Hutto* v. *Finney*, 437 U.S. 678, 689-690 (1978), and *Florida Department of State* v. *Treasure Salvors Inc.*, 458 U.S. 670, 694-696 (1982). Since all the cases—those from which the prospective-retroactive test was derived and those to which it has been applied since *Edelman*—have involved monetary relief, it is an unwarranted extension of the test to apply it to non-monetary relief, such as notice relief. The *complete* summarizing sentence in *Edelman* underscores the point:[1]

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[1] Compare respondent's version of the quotation which removes the highlighted portion. R.B. at 10, 17-18.

> A federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex Parte Young, supra, and may not include a retroactive award which requires the payment of funds from the state treasury, Ford Motor Co.* v. *Department of Treasury, supra.*

Id. at 677 (emphasis supplied).[2] Furthermore, unless the test is limited to remedies which involve *financial impact* on the state treasury, it would apply to the universe of *all* possible relief—including *non*-monetrary relief based upon and designed to remedy past misconduct—contrary to clearly established law, as shown below.

B. Respondent's Definition Of "Retroactive" Relief Would Bar Forms Of Non-monetary Relief Based Upon Determinations Of Past Misconduct That Have Long Been Approved By This Court.

There are a number of forms of "retroactive relief" (in respondent's sense of the term), other than notice relief, which this Court has approved. A good example is damage suits against state officers personally for violation of federal rights. See *e.g.*, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) and *Smith* v. *Wade*, 461 U.S. 30 (1983). In such

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[2] To similar effect is the text of the opinion in *Hutto* v. *Finney*, 437 U.S. 678 (1978):

> In the landmark decision in *Ex Parte Young* . . . , the Court held that, although prohibited from giving orders directly to a State, federal courts could enjoin state officials in their official capacities. And in *Edelman* v. *Jordan* . . . , when the Court held that the amendment grants the state an immunity from *retroactive monetary relief*, it reaffirmed the principle that state officers are not immune from prospective injunctive relief.

Id. at 690 (emphasis supplied). See also *id.* at 695. n.24. Cf. *Atascadero State Hospital* v. *Scanlon*, ____U.S. ____, 105 S.Ct. 3142, 3153-78 (1985), (Brennan, J., dissenting) (Eleventh Amendment should not apply to federal question cases at all).

cases the federal court clearly adjudicates the legality of past conduct, yet the Eleventh Amendment does not bar either the adjudication or the remedial relief so long as that relief does not have any prohibited impact on the state treasury. As this Court observed in *Scheuer* v. *Rhodes:*

> While it is clear that the doctrine of *Ex Parte Young* is of no aid to a plaintiff seeking damages from the public treasury, [citing *inter alia Edelman*], damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. . . . [P]etitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the *named defendants* for what they claim. . . was a deprivation of federal rights by these defendants under color of state law. . . .[T]heir claims, as stated in the complaints, . . .are not barred by the Eleventh Amendment.

416 U.S. at 238 (emphasis by the Court).

Habeas corpus cases are another example. The federal court issues its writ based upon a determination that a state trial violated the federal constitution. While one might characterize this relief as "retroactive" since it is based upon a finding that state officials in the past breached their federal duties to the plaintiff, the relief awarded does not have any prohibited impact on the state treasury. As this Court said in *Ex Parte Young:*

> . . .[P]ersons in the custody of state officers for alleged crimes against the state have been taken from that custody and discharged by a federal court or judge, because the imprisonment was adjudged to be in violation of the Federal Constitution. The right to so discharge has not been doubted by this Court, and it has never been supposed there was any suit against the State by reason of serving the writ upon one of the officers of the state in whose custody the person was found. . . .

209 U.S. at 167-168. The distinction which allows *habeas* relief notwithstanding the Eleventh Amendment is not whether that relief is retroactive or prospective (as understood by respondent), but the fact that such relief is ordered against a state officer and has no monetary impact on the state treasury and thus is not a suit against the state.

In fact, federal courts routinely order state officials to take affirmative actions to redress past violations of federal rights. For example, in *Papish* v. *Curators of the University of Missouri*, 410 U.S. 667 (1971), the Court held that plaintiff was illegally expelled from school, and ordered the university officials "to restore to petitioner any course credits she earned for the semester in question and, unless she is barred from reinstatement for valid academic reasons, to reinstate her as a student in the graduate program." *Id.* at 671.[3]

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[3] *See also Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 63 (3rd Cir. 1976) (*en banc*), on remand from 421 U.S. 983 (1975) (instructing district court to consider "prospective reinstatement (as to which there is no [Eleventh Amendment] immunity problem) . . ."), 590 F.2d 470, 486 (relying on *Young* and *Edelman* to explain why "the Eleventh Amendment presented no impediment to Skehan's request for prospective reinstatement as relief for the constitutional violations he established," but prohibited an order for back pay); and *Brook* v. *Thornburgh*, 497 F.Supp 560 (E.D. Pa. 1980). See also *Perry* v. *Sinderman*, 408 U.S. 593, 603 (1972) (proof of a legitimate claim of entitlement to continue employment "would obligate college officials to grant a hearing, [where plaintiff] . . . could be informed of the grounds for his nonretention and challenge their sufficiency."). See also *Goldberg* v. *Kelly*, 397 U.S. 254, 267-271 (1970) (substitute procedural safeguards ordered for welfare recipients facing terminations of benefits). Other forms of affirmative non-monetary relief in employment or school dismissal cases would include orders to expunge official records of an illegal dismissal or suspension. See *Piphus* v. *Carey*, 545 F.2d 30, 32 (7th

Each of the above forms of "retroactive" relief would be barred under respondent's reading of the sweep of the *Edelman* decision and the Eleventh Amendment. Such a reading would eliminate the federal courts' power to remedy past violations of federal rights. To protect the supreme authority of federal law, this power should be limited only when the relief "impose[s] a liability which must be paid from the public funds in the state treasury . . . ," *Edelman*, 415 U.S. at 663, and then only when that liability "is measured in terms of a monetary loss resulting from a past breach of a legal duty." *Id.* at 668. It is only in that circumstance that the "state [becomes] the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are named defendants." *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945), quoted in *Edelman*, 415 U.S. at 663. See Burnham, Federal Court Remedies for Past Misconduct by State Officials: Notice Relief and the Legacy of *Quern* v. *Jordan*, 34 Am. U.L. Rev. 53, 81-85 (1984).

C. Notice Relief Is Permitted Because It Has No Prohibited Financial Impact On The State Treasury Even Though It Is Ordered Based In Part Upon A Finding Of Past Misconduct Of State Officials.

The notice relief approved in *Quern*, of course, is the prime example of permissible non-monetary relief based upon a determination of past misconduct by state officials. As the *en banc* Seventh Circuit recognized, "[i]t cannot be strongly argued that the problem [of notice relief] did not arise in part from a past breach." 563 F.2d at 878. See also *id.* at 874 (recognizing that the notice relief requested was sought on behalf of a sub-class of "applicants who had

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Cir. 1976), modified on other grounds, 435 U.S. 247 (1978). See also *id.*, 435 U.S. at 252.

applied for AABD since July 1, 1968, and whose applications were not timely processed as required by federal regulations"). Yet, that court held that the modified notice relief was not barred because it did not "provide[] for actual retroactive payments." *Id.* at 876. See also *id.* (the Eleventh Amendment is "not a total and complete bar so long as [the relief ordered] does not constitute a retroactive award for damages to be paid by state funds"). The Court of Appeals' reasoning was explicitly approved of by this Court in *Quern:*

> In the [*en banc* Seventh Circuit's] view, such a notice would not violate the distinction set forth in *Edelman* between prospective relief, which is permitted by the Eleventh Amendment, and retrospective relief, which is not:
>
> > "The form of notice we envisage would not create a 'liability' against the state. Whether a liability might result would be a matter for state determination, not the federal court. No federal judgment against the state would be created. Such a notice could not be labeled equitable restitution or be considered an award of damages against the state. . . ."

Id. at 336, quoting *Jordan* v. *Trainor,* 563 F.2d 873, 876 (7th Cir. 1977) (*en banc*). Thus, the reason why the order for notice relief "would not violate the distinction between prospective and retrospective relief" was because such a test would be relevant only if the order for notice relief amounted to "equitable restitution or . . . an award of damages against the state." *Id.* This Court in *Quern,* of course, determined that it did not. See *Id.* at 347-348.[4]

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[4] Not surprisingly, it was precisely the differing views of *Edelman* played out here that distinguished the decision of the Third Circuit in *Fanty* v. *Commonwealth of Penn. Dept. of Public Welfare,* 551 F.2d 2

Respondent nonetheless argues that the Seventh Circuit and this Court in *Quern* "did not approve an order directing state officials to inform a class of plaintiffs 'that their federal rights had been violated in the past.'" R.B. at 19. In support of this contention, respondent cites the *en banc* Seventh Circuit's discussion of what was wrong with the district court notice. This is not a correct reading of either the *en banc* Court of Appeals' opinion or of this Court's affirmance of that decision in *Quern*.

The distinction made by the Seventh Circuit—between a *determination of past misconduct* accompanied by an order to send notices and a *determination of present liability to pay* retroactive benefits—has already been

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(3rd Cir. 1977), cert. denied 440 U.S. 957 (1979), from the *en banc* Seventh Circuit decision in *Jordan* v. *Trainor*, *supra*. This fact is important since the Court granted certiorari in *Quern* to resolve the conflict between those two decisions. 440 U.S. at 334, 346. In *Fanty* the Third Circuit denied notice relief because, as argued by respondent here, it viewed *Edelman* as holding that any "form of redress for a 'past breach of a legal duty' " was barred. *Fanty*, 551 F.2d at 4. The *en banc* Seventh Circuit took the contrary view that the Eleventh Amendment is not "a total and complete bar so long as [the relief ordered] does not constitute a retroactive award for damages to be paid by state funds." *Jordan* v. *Trainor*, 563 F.2d at 876. In emphasizing in *Quern* that "[t]he Court in *Edelman* considered only the constitutionality of the relief before it," 440 U.S. at 347 n.18, and in holding that the notice relief, as modified by the *en banc* Seventh Circuit, did not have prohibited financial impact on the state treasury, *id.* at 347-348, this Court adopted the view of the *en banc* Seventh Circuit and that put forth by petitioners here, and rejected the Third Circuit's position in *Fanty* and respondent's view here. See also Quern v. *Jordan*, 440 U.S. 332 (1979), Brief of Respondent Jordan at 11-14, 23-31, and 35-47 (arguing that *Edelman* and its progeny bar only retroactive monetary relief) and Brief of Petitioner Quern at 14-29 (arguing that *Edelman* bars any exercise of Federal judicial power concerning past action or inaction of state officers).

pointed out. P.B. at 39-40. Any doubt about the Seventh Circuit's thinking on this point is settled by its reference to *Grubb* v. *Sterrett*, 315 F.Supp 990 (N.D. Ind. 1970), *aff'd mem.* 400 U.S. 922 (1970). Referring to *Grubb*, the Seventh Circuit observed:

> That decision provided for notice to members of the class whose applications for Indiana public assistance had *previously been denied* under a regulation *subsequently held to be invalid*. The notice was to contain no prejudgment of state liability. The state was left to make the eligibility determination according to federal and state regulations.

563 F.2d at 876 (emphasis supplied).

Just as clearly as *Grubb* did *not* adjudicate *present liability* on the part of the state to *pay* retroactive benefits or order that they be paid, it *did* adjudicate, in 1970, the legality of Indiana's stepparent regulation back to the effective date of the federal regulation which it violated—August 8, 1968. The district court's opinion states:

> Since the HEW regulation . . . defining when the presence of a stepparent would make a child ineligible for AFDC assistance became effective August 8, 1968, all decisions on eligibility for AFDC made after that date which were inconsistent with this federal regulation were incorrect.

315 F.Supp at 995-996. Based upon this finding, the district court's judgment ordered Indiana to notify all persons denied assistance "*after August 8, 1968 . . . that the 'stepfather' regulation has been invalidated. . . ,*" and that "they may appeal . . . the denial or termination [of assistance] . . . *for the period during which it was denied. . . .*" *Id.* at 996, (emphasis supplied). Thus, the Seventh Circuit clearly distinguished, as did the district court in *Grubb*, between a *declaration of past illegality*

and a *determination of present liability* for payment of lost benefits. Under the Eleventh Amendment, a federal court must limit itself to the former activity.[5]

II. Even If The Prospective-Retroactive Test Applies To Both Monetary And Non-Monetary Relief, Notice Relief Qualifies As Prospective Relief.

Even if the prospective-retroactive test does apply to *all* relief which a federal court might order, "[notice] relief

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[5] Respondent correctly argues that the *Quern* notice was a "mere explanatory notice" which told class members "no more . . . than they would have gathered by sitting in the courtroom." 440 U.S. at 349, quoting 563 F.2d at 877-878. However, class members "sitting in the courtroom" surely would have "gathered," as did the panel of the Seventh Circuit in the first appeal, that "[t]he district court . . . found defendants to be noncompliant [with federal promptness processing regulations] *from and after the effective date of the regulations* [July 1, 1968]" (emphasis added). 472 F.2d at 996, rev'd on other grounds *sub nom. Edelman* v. *Jordan*, 415 U.S. 651 (1974). More importantly, this Court's discussion of the Eleventh Amendment in *Quern* reflects that it, too, "gathered" that the district court had determined that the state regulation was invalid during the time that AABD applications of the 1968-71 class were processed. In observing that there were "numerous missing links" in the "chain of causation" between the order for notice relief and any eventual order of retroactive benefits, this Court pointedly did not mention the most obvious "missing link" which could sever the chain even for class members who chose to take advantage of state procedures—the possibility that the state regulations under which those applications were processed might have been *valid* from 1968 to 1971. Even the parties in *Quern* "gathered" that the district court had declared the past actions of Illinois officials to be in violation of federal law. On remand, the defendant state officials agreed to a group hearing decision (that class members would receive in response to notice) which stated that "[t]he federal court in *Jordan* v. *Quern* found that AABD benefits were wrongfully withheld from [class members] who applied for AABD between July 1, 1968, and April 16, 1971." *Jordan* v. *Quern*, 71 C 70, Stipulation, Exhibit C, (ND Ill Sept. 27, 1979) (lodged with the Clerk of the Court). The cases decided since *Quern* similarly reflect federal question determinations of past misconduct. See Notice Relief Excerpts, App. *infra* at A-1.

falls on the *Ex Parte Young* side of the line rather than on the *Edelman* side." *Quern*, 440 U.S. at 347. This is so because, like *habeas corpus* cases, disciplinary school or employment record expungement cases, orders for reinstatement of an illegally dismissed student or public employee, and the order for compensatory education programs in *Milliken II*, the relief ordered, while in part based upon and designed to remedy a *past* breach of a federal duty, is also in part based upon and designed to remedy a concommitant *present* federal duty to remove the continuing effects of that past misconduct.

The *present* federal duty—found in federal regulations regarding administrative hearings and correction of underpayments—is to eliminate the continuing effects of that past breach by notifying class members of their right to a hearing at which they may be able to recover benefits illegally denied in the past. As such, an order for notice relief, to paraphrase *Milliken II*, is based upon the present and continuing federal statutory and regulatory duty "to take the necessary steps 'to eliminate . . . all vestiges of'" past illegal denials of benefits and is "designed to restore" class members "to the position they would have enjoyed absent . . . violation by state . . . officials." 433 U.S. at 290, 281. Upon receipt of the notices, welfare class members are placed back in the position they were in when they were first denied benefits with the same important difference noted in *Millikan II*—because of the federal court ruling that state policy was illegal under federal law, state determinations of whether they may obtain an award of retroactive benefits will be made "absent" the illegal aspects of that state policy.

Regarding her federal duties vis-a-vis past underpayments, respondent argues that Section 602(a)(22) applies only to underpayments as defined and determined by the *state* alone. R.B. at 35. This, respondent argues, is

supported by the definition of underpayment in 45 CFR § 233.20(a)(13)(ii), which states that an underpayment is determined by reference to whether the recipient was "eligible." But the concept of eligibility underlying § 602(a)(22) must be construed *in pari materia* with § 602(a)(10) as to which this Court has held that "[e]ligibility, so defined [in 602(a)(10)] must be measured by federal standards." *Carleson* v. *Remillard*, 406 U.S. 598, 600 (1971). See also *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971) and *King* v. *Smith*, 392 U.S. 309 (1968). It is highly unlikely that HHS, in referring to an "eligible assistance unit" when defining underpayments in 45 CFR § 233.20(a)(13)(ii), or Congress, in requiring that "any . . . underpayment of aid" be "promptly . . . correct[ed]" in § 602(a)(22), would somehow have in mind eligibiity according to *state* standards, no matter how contrary to federal law those standards might be.

Even if § 602(a)(22) is applicable to corrective payments only within the context of the state administrative hearing process (see R.B. at 36), petitioners here, as was the case in *Quern*, seek notice relief directed primarily at the possibility of recovery *through that very hearing mechanism*. At no point have petitioners requested any order compelling direct payment pursuant to § 602(a)(22). Respondent concedes that she has a federal and state duty to correct past underpayments accomplished in violation of federal law at least in the context of the fair hearing mechanism, (see R.B. at 36), and this is all that is necessary to support an order for notice relief.

III. For Eleventh Amendment Purposes, The Reason For The Lack Of Any Future Conflict Between State And Federal Law Is Irrelevant.

In her brief (at 26-27), respondent distinguishes *Silva* v. *Vowell*, 621 F.2d 640 (5th Cir. 1980) and *Appleyard* v.

Wallace, 754 F.2d 966 (11th Cir. 1985), on the ground that neither of those cases involved a change in federal law. What difference this should make is not clear. If the crux of respondent's argument is that under *Ex Parte Young* an ongoing permanent injunction (to remedy *future* violations) is a necessary predicate for notice relief (to remedy *past* violations), then whether the absence of such a permanent injunction is attributable to a change in federal law or to the defendant's voluntary change in policy should make no difference whatsoever. See also P.B. at 16 n.11; Burnham, 34 Am. U.L. Rev. at 57 n.10.[6] Thus, the respondent makes a distinction without a difference, and the petitioners' support in the Fourth, Fifth, Ninth, and Eleventh Circuits cannot be seriously doubted. See P.B. at 27, 30.

Even if respondent's distinction of *Silva* and *Appleyard* made analytical sense, the line she seeks to draw does not apply here. In both of the present cases below it was not the change in federal law *per se* that eliminated a future conflict, but also respondent's voluntary changes in state policy to comply with the new federal law. But for those voluntary changes, ongoing conflict with the *new* federal law would have remained, and petitioners surely would have amended their complaint to challenge the inconsistencies between the new federal requirements and the prior state practice. See P.B. at 2-3, 4-5; J.A. at 96-97, 43.

Under respondent's theory of *Ex Parte Young*, *Edelman*, and *Quern*, eleventh-hour voluntary compliance with federal law would be sufficient to divest the

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[6] The federalism interests are clearly the same in both situations. In addition, when only notice relief is ordered, the intrusion on state sovereignty is far less than in cases like *Ex Parte Young*, where relief much more intrusive upon state functions was approved.

federal court of jurisdiction to consider any non-monetary relief for past unlawful acts no matter how longstanding the illegal policy or how egregious its contravention of federal law. The federal court would have to dismiss not just the claim for relief against future application of that policy but also the claims of all those persons whose federal rights were violated in the past. See *Davis* v. *City of Los Angeles*, 440 U.S. 625, 631 (1979). The result would be that unscrupulous state officials could violate clear federal requirements whenever it suited their purposes, knowing full well that each day of delay would never be remedied.

The present cases are illustrative. Regarding the stepparent issue, this Court had decided no fewer than four cases invalidating state policies denying or reducing AFDC eligibility based on the assumption of support from persons without a legal obligation to support coextensive with that of natural or adoptive parents. See *King* v. *Smith*, 392 U.S. 309 (1968) (man-in-the-house); *Solomon* v. *Shapiro*, 300 F.Supp 409 (D. Conn. 1969), *aff'd mem.* 396 U.S. 5 (1970) (stepparent); *Grubb* v. *Sterrett*, 315 F.Supp 990, *aff'd mem.* 400 U.S. 922 (1970) (stepparent); and *Lewis* v. *Martin*, 397 U.S. 552 (1970) (stepparent). See also 45 CFR § 233.90(a)(1). In the child care expense case, *Shea* v. *Vialpando*, 416 U.S. 251 (1974), directly applied to Michigan's total refusal to allow deductions of child care expenses incurred by working recipients. See also HHS correspondence, J.A. at 69-72. Yet, under respondent's theory, she would have the power to avoid *any* federal court determination of the illegality of her policies by simply deciding—presumably at any point before entry of judgment—to do finally what federal law had required her to do all along.

IV. *Quern* v. *Jordan* Determined That Potential Difficulties In Pursuing State Judicial And Administrative Remedies Are Irrelevant To The Propriety Of Entering An Order For Notice Relief.

In *Quern*, as here, state officials argued that class members' claims would be barred in subsequent state proceedings. 440 U.S. at 348 n.20. This Court, while acknowledging that "[t]hese facts may influence a plaintiff class member in deciding whether to pursue existing state administrative remedies . . .", deemed the arguments "not at all relevant to the question of the propriety of the notice fashioned by the Court of Appeals" and concluded that such considerations "do not affect our conclusion that the notice relief awarded . . . is permissible under the Eleventh Amendment." *Id.* The issue of whether any such claims are time-barred is similarly "not at all relevant" to the Eleventh Amendment issues discussed here.

In any event, petitioners have a number of arguments which they could make in the state courts to avoid limitation problems. Respondent asserts that "as in the *Tomanio* case [446 U.S. 478 (1980)], Michigan also has no tolling statute which would apply in this case." R.B. at 33. This assertion is utterly without foundation. The two Michigan cases cited by respondents in support of this proposition demonstrate its falsity. See *Buscaino* v. *Rhodes*, 385 Mich. 474, 189 N.W. 2d 202 (1971) and *Stewart* v. *Michigan Bell Telephone Co.*, 39 Mich. App. 360, 197 N.W. 2d 465 (1972). In construing the provisions of MCLA 600.5856, both of these cases quote the Committee Comments on the applicability of that section where a prior lawsuit has been filed:

> In the event of the dismissal, on some ground other than on the merits (as for example—lack of jurisdic-

> tion over the subject matter) of an action in which [personal] jurisdiction over the defendant is acquired, the period of time from the time of service or the acquisition of jursidiction over the defendant until dismissal will not count as part of the time of limitation, for during such time the statute has been tolled.

Buscaino, 189 N.W. 2d at 206; *Stewart*, 197 N.W. 2d at 468.

None of the puzzling over applicable rules of limitation or tolling evidenced in *Tomanio* would be necessary here. Michigan law requires that claimants exhaust federal remedies before filing in the Court of Claims, MCLA 600.6440. Michigan law also specifically states that filing in federal court within three years is a timely filing, MCLA 600.6452(1), and that the normal tolling rule applies to all Court of Claims actions, MCLA 600.6452(2). See App. *infra* at A-3.[7]

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[7] Respondent's other arguments—that the 90-day state time limit on requests for administrative hearings would bar any relief after judgment in this case, or that respondent's actions are unreviewable after 90 days—are also without merit. In effect these arguments would require the exhaustion of administrative remedies clearly foreclosed by *Patsy* v. *Board of Regents*, 457 U.S. 496 (1983), see also *King* v. *Smith*, 392 U.S. 309, 312 n.4 (1968), or would impose a 90-day statute of limitations on § 1983 actions, contrary to *Burnett* v. *Grattan*, 468 U.S. ____, 78 L.Ed. 2d 357 (1984), and *Wilson* v. *Garzia*, 471 U.S. ____, 85 L.Ed 2d 254, 265 (1985). Furthermore, in both cases below the federal class actions were filed within 90 days of the named plaintiffs' negative case actions. (J.A. at 14, 119.) Petitioners would also argue that because their notices were defective under MAC R400.902, the 90-day period has not yet begun to run. See MAC R400.904(4) and Declaration of Johnny Green, ¶ 11, 14 (J.A. at 131, 132), and Consent Judgment, ¶ 4(b), *Card* v. *Dempsey*, Civil Action No. 7-70131 (E.D. Mich 1977), appendix to this Brief at A-5. Finally, petitioners would note that in the stepparent case the respondent

V. Petitioner's Claims For Relief Are Not Moot.

Respondent appears to argue that because petitioners' claims for declaratory and injunctive relief are barred by the Eleventh Amendment, the case should be dismissed on mootness grounds. Respondent's argument amounts to an assertion that when all relief is barred, a case is "moot." Obviously, the same could be said of cases dismissed, *e.g.*, for failure to state a claim, or for failure to prove a claim, or for failure to file a claim within the statute of limitations. To say that such failings make the case "moot" adds nothing to the analysis and needlessly distorts the mootness doctrine.

The respondent is also wrong. As the Sixth Circuit correctly found, in both cases below petitioners' retained "a legally cognizable interest [personal stake] in the outcome" such that the dispute over entry of an order for notice or declaratory relief presented a "live" case or controversy, (even though the claims for injunctive relief against future violations were mooted in October, 1981). J.A. at 163, 164-167. See *Geraghty* v. *U.S. Parole Commission*, 445 U.S. 388, 396 (quoting *Powell* v. *McCormick*, 395 U.S. 486, 496 (1969); see also *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 121-122 (1974). Of all of the recent Eleventh Amendment litigation on this point, respondent is unable to point to a single case

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denied classmembers' *timely* requests for hearings on the grounds that the issue raised was unappealable, see *e.g.*, Form Letter of April 1, 1981, Gruesbeck to Graf, appendix to this Brief at A-8, and then, after entry of the preliminary injunction, respondent denied subsequent hearing requests as *untimely*. See Graf Hearing Decision dated January 25, 1982, appendix to this Brief at A-9. See also *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673 (1930), *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434-435 (1982), and Burnham, 34 Am. U.L. Rev. at 96 n.225, n.226.

where her mootness argument has succeeded. Indeed, those cases which consider mootness reject respondent's argument and go on to decide the Eleventh Amendment issues. See *e.g.*, *Banas*, J.A. at 163-167, *Simpson* v. *Miller*, 93 FRD 540, 543-545 (N.D. Ill. 1982), *Moore* v. *Miller*, Civil Action No. 81-C-7265, Memorandum and Order, (N.D. Ill. 6/28/85), Appendix to this Brief at A-12. Finally, this Court implicitly rejected respondent's argument when it decided the *Quern* case rather than dismissing it on mootness grounds. Especially after the abolition of the AABD program in 1973, the same mootness argument advanced by respondent here could have been made about the motion for notice relief in the *Jordan* litigation since, in that case as in the present one, the sole surviving claim for coercive relief was the request for notice relief. See P.B. at 12 n.7, and *Moore* v. *Miller*, *supra*, Appendix to this Brief at A-18.[8]

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[8] Just such an argument was made by one of the judges forming the majority in *Fanty* v. *Commonwealth of Penn. Department of Public Welfare*, 551 F.2d 2 (3rd Cir. 1977). In *Fanty*, Judge Garth argued that "[s]ince the only personal interest the named plaintiffs have ever had is a possibility of ultimately obtaining reimbursement through proceedings in a state forum, there was never any 'immediacy' to their federal claims." 551 F.2d at 8 (Garth, J. concurring). By the time the *en banc* Seventh Circuit decided *Jordan* v. *Trainor*, 563 F.2d 873 (7th Cir. 1977) (*en banc*), it had the benefit of Judge Garth's advice before it. That court referred to the Article III "problem" raised by Judge Garth, *Jordan*, 563 F.2d at 874, but it obviously did not agree with him. It did not dismiss on jurisdictional grounds and, to the contrary, approved a form of notice relief to the named plaintiff and the class. In *Quern* v. *Jordan*, this Court also acknowledged Judge Garth's belief that "there was no case or controversy." *Quern*, 440 U.S. at 334 n.2. This Court nonetheless proceeded to decide the propriety of the notice relief ordered by the Seventh Circuit. Thus, by deciding the *Quern* case on the merits, this Court necessarily determined that a claim for notice relief constitutes a justiciable case or controversy under Article III. See Burnham, 34 Am. U.L. Rev. at 102-103.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case should be remanded with the directions that declaratory and notice relief are not barred by the Eleventh Amendment, and may be entered if petitioners prevail on the merits of their motion for summary judgment.

Respectfully submitted,

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APPENDIX

NOTICE RELIEF EXCERPTS

Fabula v. *Buck*, 538 F.2d 869, 874 (4th Cir. 1979) (holding Maryland transfer-of-assets rule invalid under federal law and remanding case for appropriate relief "with provisions for notice to members of the plaintiff classes apprising them of this decision and of any administrative procedures available to them under state law"); *Randall* v. *Lukhard*, 536 F.Supp 723 (W.D. Va. 1981) (declaratory relief holding pre-July 1981 state medicaid policy invalid under then existing federal law) and No. 80-50-C, Memorandum Opinion and Order (W.D. Va. July 22, 1982) (notice provided: "Before July 1, 1981, Virginia had a [transfer of assets] rule . . . by which state officials denied Medicaid eligibility to people . . . A federal court in Charlottesville, Virginia, has recently declared that state rule invalid. THE COURT ORDERED THE STATE TO TELL PEOPLE WHO WERE DENIED MEDICAID BECAUSE OF THIS RULE THAT THEY MAY BE ABLE TO RECOVER MONEY SPENT OR OWED IN THE PAST FOR WHICH MEDICAID WOULD HAVE PAID FOR. . . .") (lodged with the Clerk of the Court), *modified on other grounds*, 729 F.2d 966 (4th Cir. 1984) (*en banc*), *cert. denied* ___ US ___, 105 S.Ct. 222 (1984); *Beltran* v. *Myers*, [1982 Transfer Binder] CCH Medicaid and Medicare Guide Par. 31,835 (N.D. Cal. Feb. 4, 1982) ("Case authority and the interpretation of the responsible federal agency overwhelmingly indicate that the California transfer rule was prohibited by federal law in effect through June 30, 1981.") and No. 78-2350 CBM (Mx), exhibit A attached to order, at 1 ("A federal court in Los Angeles has recently declared [California's transfer of assets rule] invalid. THE COURT ORDERED THE STATE TO NOTIFY PEOPLE WHO WERE DENIED ELIGIBILITY IN THE PAST BECAUSE OF THIS RULE THAT THEY MAY BE ABLE TO RECOVER AMOUNTS WHICH WERE SPENT OR OWED IN THE PAST which the Medi-Cal program should have been paying for." (lodged with the Clerk of the Court), *aff'd* 701 F.2d 91, 94 (9th Cir. 1983) ("The notice required [by

the district court] falls within the guidelines of *Quern* v. *Jordan*, . . ."), *cert. denied sub nom. Rank* v. *Beltran*, ___ US ___, 103 S.Ct. 3115 (1983); *Herweg* v. *Ray*, 481 F.Supp 914, 918 (S.D. Iowa 1978) (notice provided: "On January 19, 1978, the federal district court for the Southern District of Iowa declared that the Iowa Department of Social Services was in violation of federal law by its method of computing . . . income . . . under the Medicaid program.") *aff'd* 619 F.2d 1265 (8th Cir. 1980) (*en banc*), *rev'd on other* grounds 455 US 265 (1982); *Silva* v. *Vowell*, 621 F.2d 640, 651 (5th Cir. 1980) (notice provided: "The United States District Court for the Southern District of Texas, Brownsville Division, has ruled that the disability standard under which your application or claim for AFDC-I benefits may have been evaluated, did not conform to federal standards."), *cert. denied sub nom Johnston* v. *Silva*, 449 US 1125 (1981); *Appleyard* v. *Wallace*, 754 F.2d 955, 962 (11th Cir. 1985) (quoting notice from *Silva* with approval).

600.6440 Same; remedy in federal court as bar to jurisdiction

Sec. 6440. No claimant may be permitted to file claim in said court [of claims] against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof.

600.6452 Same; filing of claim, time, limitation of actions

Sec. 6452. (1) **Filing of claim.** Every claim against the state, cognizable by the court of claims, shall be forever barred unless the claim is filed with the clerk of the court or suit instituted thereon in federal court as authorized in section 6440,[1] within 3 years after the claim first accrues.

(2) **Limitation of actions.** Except as modified by this section, the provisions of RJA chapter 58,[2] relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section.

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[1] Section 600.6440.

[2] Section 600.5801 et seq.

600.5856 Tolling of statute; filing of summons and complaint; service on defendant

Sec. 5856. The statutes of limitations are tolled when

(1) the complaint is filed and a copy of the summons and complaint are served on the defendant, or when

(2) jurisdiction over the defendant is otherwise acquired, or when,

(3) the complaint is filed and a copy of the summons and complaint in good faith, are placed in the hands of an officer for

immediate service, but in this case the statute shall not be tolled longer than 90 days thereafter.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 770131

JOSEPHINE CARD, ALFREDA BURBRIDGE, GAIL GRIFFIN, WESTSIDE MOTHERS WELFARE RIGHTS ORGANIZATIONS, on behalf of its members, and all plaintiffs individually and on behalf of all others similarly situated,

Plaintiffs,

v.

JOHN T. DEMPSEY, Individually and in his official capacity as Director, Michigan Department of Social Services,

Defendant.

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* * * *

FINAL CONSENT JUDGMENT

[excerpt]

4. For the protection of those class members who file requests for administrative hearings after the date of this Final Consent Judgment (hereafter "future class members") and in order to protect those past class members who may not be identified through the procedures outlined in the immediately preceding paragraph, the following actions shall be taken and shall be deemed adequate protection for such absent past and future class members:

. . . . . .

b. The defendant shall notify all Administrative Law Judges in the Department of Social Services that there is no limitation on the amount of retroactive Food Stamp benefits which may be awarded through the hearing process, and that

a fair hearing does not begin to run until or unless the household is notified in writing by way of a notice of adverse action which comports with the requirements of 7 C.F.R. 271.1(n) (1977) or any successor regulation. Under this requirement, a request for a hearing to contest delays in processing a household's application will always be timely unless the household received notice of adverse action and its request for hearing was filed over 90 days after the date of such notice.

* * *

/s/ John Feikens
United States District Judge

Approved for Entry:

Michigan Legal Services
Attorneys for Plaintiffs

July 29, 1977

By: /s/
WILLIAM BURNHAM
KENNETH LEE LEWIS

FRANK J. KELLEY
Attorney for Defendant

By:
ROBERT N. ROSENBERG
Assistant Attorney General

EXHIBIT C-3-

REQUEST FOR HEARING
Michigan Department of Social Services

INSTRUCTION: Complete all items below. (Please type or print.) Send completed form in envelope provided or, mail to:

Department of Social Services
Bureau of Administrative Hearings
P.O. Box 30041
Lansing, Michigan 48909

Caroline Graf
K 3 026299A 3/16/
63 01 46 05

Date Completed DSS-18 Received From Claimant

This request for hearing concerns the follow (check one or more):

☐ ADC Grant ☐ Food Stamps ☐ Level of Nursing Care ☐ General Assistance
☐ Medical Assistance ☐ Services ☐ Licensing ☒ Other

I request an administrative hearing before an Administrative Law Judge regarding the decision of _____ (Name of County or State Division)
Department of Social Services. Following are my reasons for requesting a hearing.

Please do not close my stepparent Grant because it will cause a hardship on my whole family and we would all end up on ADC

Traced by Mary Wild

IMPORTANT: PLEASE ENCLOSE NOTICE YOU MAY HAVE RECEIVED WHICH CAUSED YOU TO REQUEST A HEARING.

Signature of Person Requesting Hearing	signed by Caroline Graf	Telephone Number	Date
Street Address or Route Number	City, State, and Zip Code		
293 Helwig St	Rochester, Mi 48063	852-9495	3/16/81

TO BE COMPLETED ONLY IF AN ATTORNEY HAS AGREED TO REPRESENT YOU AT THE HEARING

Name of Attorney	Firm or Society	Telephone Number
OCWRO	OCWRO	
Street Address or Route Number	City, State, and Zip Code	
70 Lastone	Pontiac 48058	

EXHIBIT C-3

EXHIBIT C-3-

April 1, 1981

:Ms. Carolyn Graf
1036 Melvir
Rochester, MI 48063

RE: Graf, Carolyn, Request received March 23, 1981
0333 X5025299A

Dear Ms. Graf:

Your request for a hearing has been received, however, it will not be scheduled for a hearing because it involves an automatic grant adjustment required for a class of recipients and does not involve an incorrect grant computation.

The Michigan Administrative Code 400.903(3) provides the following:

> "A hearing shall not be granted when either state or federal law requires automatic grant adjustments for classes of recipients, unless the reason for an individual appeal is incorrect grant computation."

We are returning your request. The change in your grant will take effect on the date listed in the notice you received since a hearing cannot be granted.

Sincerely,

Ronald M. Gruesbeck, Director
Bureau of Administrative Hearings

RMG/mkw

Enclosure

cc: Oakland County DSS
Oakland County

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES
BUREAU OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF:
CAROLYN GRAF,
Claimant

Reg. No. 81-16214 (1034)
Case No. 063 K5026299A
Hearing Date: 12-2-81
Oakland County DSS

HEARING DECISION

This matter is before the Administrative Law Judge pursuant to MCLA 400.37; MSA 16.437 and MCLA 400.9; MSA 16.409 upon claimant's request for a hearing to protest the department's refusal to pay retroactive aid to dependent children (ADC) benefits. A telephone hearing was conducted.

ISSUE

Does jurisdiction exist to hear claimant's request for retroactive benefits?

FINDINGS OF FACT

The Administrative Law Judge, upon the competent, material and substantial evidence on the whole record, finds as material fact:

(1) Claimant was an ADC recipient whose grant was cancelled on 4-7-81 because of excess income based upon the minor's stepparent's income being considered in determining eligibility in accordance with departmental policy then existing. A notice advising claimant of the department's proposed action was mailed to her on March 81.

(2) On 10-28-81 the claimant requested retroactive benefits from March through August of 1981.

(3) The department paid to claimant the benefits from June 16, 1981 to August, 1981 in the amount of $170.50 in accordance with departmental policy reflected in Social Services Letter #1000-81-44.

(4) Claimant seeks retroactive ADC benefits from March, 1981 to June 15, 1981, based upon her present request for a hearing dated 9-12-81.

(5) Claimant's child was financially eligible for ADC benefits from and including March to June 15, 1981.

CONCLUSIONS OF LAW

The ADC program is established pursuant to Title IV of the Social Security Act which is implemented by Title 45 of the Code of Federal Regulations (CFR) and administered by the Department of Social Services.

The initial question is whether the Bureau of Administrative Hearings has jurisdiction to hear a claim for benefits that existed in March of 1981 based upon a hearing request filed on 9-12-81.

45 CFR Section 205.10(a)(5)(iii) provides that the State plan for ADC shall provide for a system of hearings under which the claimant shall be provided reasonable time, *not to exceed 90 days*, in which to appeal an agency action. (Emphasis added). See also DSS MAC Rule 400.904(4); APM Item 630, page 2.

Claimant was sent a negative action notice of her grant cancellation in March 1981 which was effective on 4-7-81. Her request for a hearing to contest the grant cancellation was filed on 9-12-81. This was far in excess of the 90-day period allowed for this Bureau to have jurisdiction to hear and decide this matter.

DECISION AND ORDER

The Administrative Law Judge upon the above findings of facts and conclusions of law, decides that no jurisdiction exist to hear and decide this claimant's request for a hearing.

Therefore, claimant's hearing request is hereby dismissed.

/s/ John N. Atkinson
JOHN N. ATKINSON
Administrative Law Judge

Date signed: 1-25-82
Date mailed: Jan 26, 1982

NOTICE: The law provides that within 30 days of receipt of the above Decision and Order the claimant may appeal it to the circuit court for the county in which she lives.

JNA:jj

cc: Carolyn Graf
Dorothy Brow
Oakland County DSS
A. John Vielbig
Don Czinder
Judge John N. Atkinson
Administrative Hearings (2)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 7265

SHARON MOORE and JIMMIE MOORE, JOHNNY JEFFERSON, individually on behalf of all persons similarly situated,
Plaintiffs,

v.

JEFFERY MILLER, Director of the Illinois Department of Public Aid, and the ILLINOIS DEPARTMENT OF PUBLIC AID,
Defendants.

JUL 12 '85

MEMORANDUM AND ORDER

In *Quern* v. *Jordan*, 440 U.S. 332 (1979), the Supreme Court approved a district court order requiring notice be sent to class members informing them of the state administrative avenues available for retrospective monetary relief if the members were improperly denied benefits. The Court found the notice to be "ancillary" to the prospective relief already ordered by the district court and allowed by *Ex Parte Young*, 209 U.S. 123 (1908), and *Edelman* v. *Jordan*, 415 U.S. 615 (1974). Plaintiffs in the present case seek notice relief even though this court's injunction regarding the handling of benefit payments has been rendered a nullity by a change in federal law. The Fourth Circuit [should read Sixth Circuit] has held such notice relief unavailable. *See Banas* v. *Dempsey*, 742 F.2d 277 (4th Cir. [sic] 1984), *cert. granted sub nom Green* v. *Mansour*, 105 S.Ct. 1863 (1985). The *Banas* court found that notice relief was required to attach to some prospective injunctive relief and because none existed notice relief would not be allowed. This court disagrees and grants the notice relief requested.

I. HISTORY

Plaintiff filed this class action complaint in December 1981, attacking the Illinois Department of Public Aid's method of

determining income levels with regard to receipt of earned income credits. In December 1983 this court granted plaintiffs motion for a preliminary injunction. *See Moore* v. *Miller*, 579 F.Supp. 1188 (N.D. Ill. 1983).[1] The court held that IDPA had to have a reasonable certainty of EIC eligibility before deducting expected receipt of EIC payments from a recipient's income in the calculation of AFDC benefits and could not rest upon assumptions. Effective October 1, 1984, the Deficit Reduction Act of 1984, Public Law No. 98-369, § 2629, changed the federal statute to allow crediting a recipient's income with an EIC payment only if an EIC payment is actually received. *See* 42 U.S.C. § 602(d)(1) (1985). This standard is in accord with the IDPA's practice after this court's grant of a preliminary injunction and this court's order of May 4, 1984.

Now before the court is plaintiff's motion for summary judgment, seeking declaratory and notice relief as well as permanent injunctive relief. Defendants also move to dissolve the preliminary injunction issued by this court in 1983. In addition, plaintiff's motion for class certification still remains from its filing at the inception of this action.

II. INJUNCTION

Plaintiffs move for a permanent injunction regulating the crediting of EIC payments to AFDC recipient's incomes. At the same time defendants move to dissolve the present preliminary injunction. Due to the change in the law, and without any indication that defendants interpret that law differently than espoused in their briefs, the court would be disposed to dissolve the injunction but for an uncertainty respecting reimbursement of persons who had ceased being recipients between December 1983 and May 1984, when IDPA changed its policy and thereafter reimbursed those entitled who were still recipients. Dissolution of an injunction is warranted after a "showing of changed circumstances so that continuance of the

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[1] A more detailed history of this case is included in that memorandum and order.

injunction is no longer justified and/or because it will work oppressively against the enjoined parties." *American Optical Co.* v. *Rayex Corp.*, 291 F.Supp. 502, 510 (S.D.N.Y. 1967), *aff'd* 394 F.2d 155 (2d Cir.), *cert. denied* 393 U.S. 835 (1968). The changed law is just such an occurrence. Defendant's position before the issuance of the preliminary injunction was reasonable, though found by this court to be erroneous. To maintain that position in face of a changed law would not be reasonable. The court finds the purpose of the preliminary injunction has been largely fulfilled, the complained-of conduct has been discontinued, and such conduct is unlikely to recur. *See Burgoyne* v. *Lukhard*, 410 F.Supp. 477 (E.D. Va. 1976). No gain can come by continued supervision by this court, except for resolution of the one outstanding matter. Accordingly, the preliminary injunction regulating defendant's crediting of EIC payment in the calculation of a recipient's income is continued only for the limited purpose indicated.

III. CLASS ACTION

With the preliminary injunction largely dissolved, it is now appropriate to determine the motion for class certification before proceeding further. Defendants raise two arguments against certification. First, they claim that plaintiff Sharon Moore is not qualified to represent the class due to financial information gleaned during discovery. This attack may well be justified, but plaintiff Jefferson is still capable of representing the class and thus certification can occur. Defendant's second argument is stronger. They claim that because prospective injunctive relief is no longer sought, plaintiff's claims are moot and class certification is not warranted.

Judge Marshall, in *Simpson* v. *Miller*, 93 F.R.D. 540 (N.D. Ill. 1982), dealt with the identical issue facing this court. In *Simpson*, plaintiffs, complaining of erroneous calculations of income for AFDC purposes, sought class certification and notice relief after a change in federal law made any claim for prospective injunctive relief moot. Judge Marshall, in analyzing defendant's claim of mootness, applied the two-part test

enunciated in *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 396 (1980). First, he found that plaintiff had a live interest in the outcome of the litigation because they continued to be denied the full extent of the benefits they did not receive due to the IDPA's failures. *See Simpson* v. *Miller*, 93 F.R.D. at 543. Plaintiffs still claim a present need for notice relief. Second, he found plaintiffs had a personal stake in the claim for notice relief. He made this finding because the purpose of the personal stake requirement, to ensure an adversarial presentation of concrete issues, remained satisfied by plaintiffs' request for notice relief. *Id.* at 545.

This court finds Judge Marshall's analysis in *Simpson* fully applicable to the present action, and notes that the *Banas* court followed a similar analysis. Plaintiffs in this case do continue to have a live controversy. They complain of shortfalls in their past AFDC payments. These shortfalls have not yet been remedied. They seek notice relief informing them of their administrative remedies. In addition, both plaintiffs and the IDPA are vigorously trying this action with the stakes heavy for both sides. The court finds plaintiffs' claims for notice relief not to be moot. [2]

The court now turns to Rule 23 considerations for certification of the class. The court finds the four enunciated requirements for Rule 23(c) to be satisfied. This class is much too large to allow joinder. The defendant reimbursed 11,000 recipient families for shortfalls falling between the issuance of the preliminary injunction and the state's change in their policy. It is expected that more can properly seek notice relief over the four-year period contested. Common questions of law and fact concerning the state's policy regarding EIC payments exist at the crux of this case. Typicality, at least as far as the relief that

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[2] As in *Simpson*, certification is occurring here after the change in the law. This court, in agreement with Judge Marshall, sees no mootness problem arising because of that timing. *See Simpson* v. *Miller*, 93 F.R.D. at 545 (1982).

can be awarded by this court, exists. Finally, the court finds that plaintiff Jefferson, and the attorneys handling this action, have fairly and adequately protected the interests of the class.

In the present case the IDPA has acted "on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2). Thus, a Rule 23(b)(2) class is appropriate. Because the present action satisfies the requirements of Rule 23, and the case is not moot, this court grants plaintiffs' motion for class certification.

IV. DECLARATORY RELIEF

Plaintiffs seek declaratory relief against defendants. Such relief, as long as directed against state officials and not the state itself, is permissible within the constraints of the Eleventh Amendment. *See* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3225 at 194 (2d Ed. 1984). Plaintiffs seek a declaration that between October 1, 1981 and October 1, 1984 defendants were required to calculate EIC payments in accordance with the standards set out in this court's previous memorandum.

Having reviewed its previous memorandum and order, this court agrees with its earlier conclusion. Buttressing the findings in that memorandum and order is an AFDC action transmittal, #SSA-AT-84-7, dated April 24, 1984. That transmittal requires calculations consistent with this court's ruling and inconsistent with defendants' practice before this court's ruling. The court grants defendants' motion for declaratory judgment.

The purpose of this declaratory action is to ensure proper adjudication of requests for reimbursement filed through state administrative procedures. Under the federal statutes states are required to correct any underpayment of aid. *See* 42 U.S.C. § 602(a)(22) (1985). The amount of underpayment is calculated following regulations extant at the time of the underpayment. *See* 45 C.F.R. § 233.20(a)(13)(ii) (1982). The declaratory relief

would ensure that any administrative determinations of past underpayments would be adjudicated in conformity with this court's earlier findings.

V. NOTICE RELIEF

Finally, having largely dissolved the injunction and granted declaratory relief, the court now turns to the remaining issue: notice relief. Plaintiffs seek court ordered notice informing class members that they may have been underpaid due to the IDPA's policies and informing them of the state administrative remedies. The court in *Quern* v. *Jordan*, 440 U.S. 332 (1972), found such notice relief in a similar situation appropriate when it was "ancillary to the prospective relief already ordered by the court." *Id.* at 349.

The Sixth Circuit, in *Banas*, 742 F.2d 277, relied on this "ancillary" language in denying notice relief. The *Banas* court found that notice relief was not by itself within the contours of relief allowed by *Ex Parte Young*. It noted the fiction of *Young*, that prospective injunctive relief was not an action against the state but instead an action requiring state officials to comply with federal law, and then interpreted *Quern*'s "ancillary" language to be some sort of tacking-on of notice relief to the *Young* relief, as in the concept of ancillary jurisdiction. When further prospective relief is no longer required, the court found there is nothing to which to tack on notice relief and thus such relief runs afoul of the eleventh amendment.

> Because it is the function of *Young* that shelters such ancillary orders from not being orders against the state, when the basis of that fiction—the need for injunctive relief to force state officials to comply with federal law—disappears, so does the shelter.

742 F.2d at 288. In this district, Judge Grady has explicitly followed the reasoning of the *Banas* court. In *Dandridge* v. *Coler*, No. 84 C 930 (N.D. Ill. Jan. 25, 1985), the court found that plaintiff's request for notice relief was not allowed because not "ancillary to something more than a declaratory judgment governing past official conduct," and thus found no valid claim

for relief. *See id.*, slip at 6. *See also Colbeth* v. *Wilson*, 554 F.Supp. 539, 546 (D.Vt. 1982), *aff'd sub nom. Colbeth* v. *O'Rourke*, 707 F.2d 57 (2d Cir. 1983).

This court is somewhat puzzled by the above cases. The argument constructed by the *Banas* court, and accepted in *Dandridge*, is theoretically consistent with *Ex Parte Young* and a defensible interpretation of certain language in *Quern*, but is inconsistent with results actually achieved in that litigation. The history of the *Quern* litigation, filed in this district, is crucial to the present determination. The action was filed because of failures of the IDPA to promptly commence Aid to the Aged, Blind and Disabled (AABD) payments to eligible recipients. The district court granted both injunctive and retroactive damage relief to plaintiffs. In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the Supreme Court found the retroactive damage relief to be violative of the Eleventh Amendment. Significantly, however, by the time the *Edelman* decision was rendered, the AABD program was no longer in operation. *See id.* at 653 n.2. It had been replaced by the federally funded and administered supplemental security income program. *Quern* v. *Jordan*, 440 U.S. at 348 n.20. The case thus went back to the district court in a posture where any prospective relief was mooted by the dissolution of the program and thus no prospective injunctive relief existed. The court ordered notice relief and, after modification by the Seventh Circuit, this grant of notice relief was affirmed by the Supreme Court in *Quern*. Thus, the Court in *Quern* allowed notice relief even though there really wasn't any ongoing prospective injunctive relief to which to attach the notice relief.

This necessarily brings into question the Sixth Circuit's interpretation of the term "ancillary" used in *Quern*. The most common legal use of "ancillary," and the one followed by the Sixth Circuit in *Banas*, is in the realm of subject matter jurisdiction, where one claim, for which no subject matter jurisdiction exists, for reasons of convenience and fairness, is attached onto a claim properly before the court. *See e.g. Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978). This usage,

on its face, does not seem applicable to eleventh amendment cases because jurisdictional tacking-on allowed by the concept of ancillary jurisdiction for fairness and convenience seems no basis for allowing federal court adjudication of a claim otherwise not allowed by a specific amendment to the Constitution. In Eleventh Amendment cases, however, the term "ancillary" has taken on additional legal meaning. In *Edelman*, the court held that retrospective damage awards were not allowed because they came directly from a state's treasury, but it allowed prospective injunctions, even though such injunctions inevitably cost the state money. These inevitable costs were found to be a permissible and often inevitable "ancillary effect on the state treasury." *Edelman*, 415 U.S. at 668. In *Quern* itself, the court noted, in its only other use of the word "ancillary," that prospective injunctions may have "an ancillary effect on the state treasury." *Quern* v. *Jordan*, 440 U.S. at 337. In these usages, "ancillary" seems to refer to inevitable and permissible costs.

Two factors convince this court that notice relief is itself prospective relief and that "ancillary" in that context means "an inevitable and permissible cost" which is an acceptable part of the prospective relief. First, as stated previously, such is the prior usage of the word in Eleventh Amendment cases and in the *Quern* case. *See Quern* v. *Jordan*, 440 U.S. at 337; *Edelman* v. *Jordan*, 415 U.S. at 667. The *Quern* decision, in a short substantive discussion of the notice issue, found that notice relief "falls on the *Ex Parte Young* side of the eleventh amendment line rather than on the *Edelman* side" because the claim of causation between the notice relief ordered and the payment of retrospective damages had many "missing links." *Quern*, 440 U.S. at 347. Notice relief does not itself entail a federal direction of reimbursement. Rather, it advises possible claimants of a possible state administrative procedure by which claims can possibly be filed and paid. It looks toward future action by claimants and the state. Similarly, the citation to the portion of *Milliken* v. *Bradley*, *supra*, which discusses the prospective nature of programs designed to "bring about the delayed bene-

fits of a unitary system," 433 U.S. at 290, seems to emphasize the court's finding that notice relief is itself prospective in nature, even though designed to facilitate the payment of past shortfalls and thus be acceptable under the Eleventh Amendment even without a pending prospective injunction.

Second, and most significant, is the allowance of notice relief in *Quern*, even though there was no effective ongoing injunction. This court is wary of placing too much emphasis on one word in a Supreme Court opinion, but it is on that word that the *Banas* court rested its decision. This court disagrees with the interpretation in *Banas*. That disagreement can perhaps be underscored by the application of the *Banas* court's reasoning to the facts in this case. The preliminary injunction here was entered in December 1983 (and it has not been entirely dissolved, although this court does not rest on that fact). In May 1984 the state changed its policy so as to go beyond what this court believed in December to be its federal obligations. That change was identical to the obligations created by federal law in October 1984. IDPA contends that injunctive relief was no longer necessary after May 1984. If there had been no change in the federal statute the Department would be advancing the same contention that it advances now, the bar of the Eleventh Amendment, on the basis of the *Banas* court reasoning. Notice relief would then depend upon whether a court did or did not believe that a continuation of injunctive relief was appropriate. This court does not believe that the application of the Eleventh Amendment with respect to notice relief should or does turn upon a discretionary judgment concerning the continuation of equitable relief. In the fictional world relating the Eleventh Amendment to remedies for official misconduct or error, the concept adds but another and unwarranted uncertainty.

In *Quern*, this court believes, the Supreme Court held that notice relief is permissible prospective relief without regard to an injunctive order and even though it has an ancillary impact upon a state treasury. In light of such an interpretation, notice relief is warranted here.[3]

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[3] For a more detailed application of this issue, reaching the same

CONCLUSION

The change in federal law has largely negated the need for continuing prospective relief but it has not negated the reasons for continuing this suit. Pursuant to the reasoning in this Memorandum and Order, the court finds the following relief appropriate:

(1) The preliminary injunction is dissolved, except to the extent stated herein·

(2) Plaintiffs' motion for class certification is granted;

(3) Plaintiffs' motion for declaratory relief is granted; and

(4) Plaintiffs' motion for notice relief is granted.

The parties are instructed to submit proposed notice forms within fifteen days to this court.

/s/ James B. Moran
JAMES B. MORAN
Judge, United States District Court

June 28, 1985

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result, *see Burnham*, Retroactive Welfare Benefits: Federal Class Actions after *Edelman* v. *Jordan*, Commerce Clearing House Review, July 1984 at 225. [Citation should read National Clearinghouse for Legal Services, Clearinghouse Review.]